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In the Supreme Court of the United States

OCTOBER TERM 1969

AMERICAN ART INDUSTRIES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

JOSEPH A. PERKINS
Attorney for Petitioner
M-107 Biscayne Building
Miami, Florida 33130

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PETITION FOR WRIT OF CERTIORARI

American Art Industries, Inc., sometimes referred to herein as the Company, petitions for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the Judgment, entered on October 8, 1969 (A: 16-19),[1] and Opinion rendered by the said Court of Appeals in the above entitled cause on September 5, 1969 (A: 1-15).

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[1] A — Appendix to this Petition for Writ of Certiorari.

R — Printed Record on Appeal, or as referred to by the Board, Appendix to the Petition for Enforcement in the Court of Appeals.

B — Brief of the Company filed in the Court of Appeals, a certified copy of which is a part of the record before this Court on this Petition for Writ of Certiorari.

OPINIONS BELOW

The Opinion (A: 1-15) of the United States Court of Appeals for the Fifth Circuit, dated September 5, 1969, is not yet reported. The Judgment of the Court of Appeals (A: 16-19) was entered on October 8, 1969. The Decisions and Orders of the National Labor Relations Board are reported at 166 N.L.R.B. No. 109 (A: 41-45) and 170 N.L.R.B. No. 1070 (A: 45-47), respectively.

The decisions of the Trial Examiners upon which the decisions of the National Labor Relations Board were predicated are part of the certified record to this Court (R: 6-49; 50-80).

JURISDICTION

The Judgment of the Court of Appeals sought to be reviewed was entered by the United States Court of Appeals on September 5, 1969. A timely Petition for Rehearing (A: 19-31) was filed on November 13, 1969.[2]

The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1) and also on the basis of the Supreme Court Rule 19.1(b). Petitioners contend that the decision of the Court of Appeals for the Fifth Circuit in the instant case is in conflict with the decisions of other courts of appeal

[2]An order extending the time for the filing of the Petition to and including November 15, 1969 was entered by the Court of Appeals on October 21, 1969; the Court of Appeals entered its Order Denying Petition for Rehearing (A:33) on November 26, 1969 and on December 11, 1969, by order, stayed the mandate to and including February 2, 1970.

such as **Hagopian & Sons, Inc.** v. **N.L.R.B.** (C.A. 6, 1968) 395 F.2d 947, and that the Fifth Circuit has decided the questions in a way in conflict with the application decision(s) of this Court including, but not limited to: **Universal Camera Corp.** v. **N.L.R.B.** 71 S.Ct. 456, **Brussel** v. **United States,** 90 S.Ct. 2, and **Curcio** v. **United States,** 354 U.S. 118, 77 S.Ct. 1145, *and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.*

STATUTES INVOLVED

The statutes involved in consideration of this matter are set out below:

29 U.S.C.A. §157

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, §7, 49 Stat. 452; June 23, 1947, 3.17 p.m., E.D.T., c. 120, Title I, §101, 61 Stat. 140."

29 U.S.C.A. §158.

"(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

29 U.S.C.A. 160(e)

" * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive." * * * upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the **same shall be subject to appropriate review * * * * by the Supreme Court of the United States** upon writ of certiorari or certification as provided in Section 1254 of Title 28." (emphasis added)

QUESTIONS INVOLVED

1. SHOULD THE COURT OF APPEALS WHEN DENYING ENFORCEMENT OF THE BOARD'S BARGAINING ORDER REMAND, UNDER THE GUISE THAT THE PRINCIPLES ANNOUNCED IN N.L.R.B. v. GISSEL PACKING CO. (89 S.Ct. 1918) GOVERN, THE CAUSE TO THE NATIONAL LABOR RELATIONS BOARD FOR FURTHER ADJUDICATION WHERE THE EMPLOYEES IN THE UNIT, WHO NEITHER SPOKE, NOR WROTE NOR READ ENGLISH SIGNED THE AUTHORIZATION CARDS PRINTED SOLELY IN THE ENGLISH LANGUAGE AND WHERE THE MAJORITY OF THE SIGNATURES ON THE CARDS WERE OBTAINED BY DURESS, COERCION AND VIOLENCE?

2. MAY ALL EVIDENCE OFFERED BY THE COMPANY BE EXCLUDED AND THE SIZE OF A BARGAINING UNIT BE ESTABLISHED BY SECONDARY EVIDENCE WHEN THE COMPANY AT ALL TIMES TENDERED THE ORIGINAL TIME CARDS FROM WHICH ALL OTHER RECORDS WERE TAKEN, SOUGHT TO INTRODUCE THE SAME INTO EVIDENCE, AND SUBSEQUENTLY OFFERED TO PRODUCE SUBPOENAED EARNINGS RECORDS, ALL FOR THE PURPOSE OF ESTABLISHING THAT THE APPROPRIATE UNIT WAS ALMOST TWICE IN NUMBER (76) AS THAT (43) FOUND BY THE BOARD TO BE IN THE UNIT AT THE TIME OF THE UNION'S DEMAND?

3. MAY THE PRESIDENT OF THE COMPANY, WHILE UNDER A CRIMINAL INFORMATION BROUGHT BY AN ALLEGED DISCRIMINATEE AT THE BEHEST OF THE UNION, BE REQUIRED TO PRODUCE AND TESTIFY AGAINST HIMSELF IN RESPONSE TO A SUBPOENA ISSUED AND DIRECTED SOLELY TO HIM AS AN INDIVIDUAL AND NOT AS AN OFFICER OR DIRECTOR, OR IN ANY CAPACITY AS A REPRESENTATIVE OF THE COMPANY?

4. ARE THE BOARD'S FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE WHERE AUTHORIZATION CARDS, ALTHOUGH UNAMBIGUOUS, WERE PRINTED SOLELY IN ENGLISH AND WERE UNEXPLAINED TO THE SIGNERS, A MAJORITY OF WHOM NEITHER SPOKE, WROTE NOR READ ENGLISH, AND WERE OBTAINED UNDER DURESS, AND WHERE PERTINENT AND MATERIAL COMPANY EVIDENCE WAS EXCLUDED BECAUSE A SUBPOENAED WITNESS UNDER INDICTMENT REFUSED TO PRODUCE AND TESTIFY AGAINST HIMSELF UNTIL AFTER HIS DISCHARGE, AND WHERE THE TRIAL EXAMINER DENIED COMPANY COUNSEL THE RIGHT TO EXAMINE AND CROSS-EXAMINE WITNESSES FOR THE PURPOSE(S) OF TESTING CREDIBILITY AND IMPEACHMENT?

STATEMENT OF THE CASE AND FACTS[3]

Teamsters Local 198, hereinafter referred to as the Union, began, unknown to the Company, an organizational drive on or about July 18, 1966 when Jesus Diaz,[4] a Company employee, delivered authorization cards to 2 fellow employees (R: 255, 594). Yet organizing did not actually get under way until Wednesday morning, July 20, 1966, when a Union picket line appeared about the Company's place of business (R: 109-111, 116, 133, 252, 584, 607) and there was a work stoppage; on the day prior, Tuesday, 4 employees, allegedly organizers, had been laid off. Both the Board (R: 4) and the Court found that the work stoppage was in support of the 4 employees, supra, but was not an unfair labor practice strike. In any event, on the next day, "On July 21, the Company invited all the strikers including the 4 laid off organizers to return to work by posting notices at the plant and by sending each striker a copy of a notice by mail." (A: 4)

On the day of the work stoppage, Wednesday, July 18th, the conduct of the organizers and Union pickets and some employees was such that the **Company was required to obtain a state court injunction** (A: 33-35; R: 972, 973, 974; Company's rejected exhibit 49) restraining the Union and others from threatening, harassing and coercing the

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[3]The Court is referred to the Statement of the Case (B: 3-6) and to the Statement of the Facts (B: 6-33) in the Company's Brief in the Court of Appeals which is part of the certified record before this Court, wherein there is a more complete and comprehensive statement; said Brief is made a part of this Petition by reference as if fully set out herein.

[4]The employee, Diaz stated he first obtained authorization cards from the Union organizer on July 13, 1966 (R: 94).

Company's employees in the solicitation of signatures upon authorization cards and from preventing ingress and egress to the Company's place of business.[5]

On that very Wednesday, July 20th, a charge was filed against the Company claiming 8(a)(1) and (3) violations (29 U.S.C. 158(a) 1, 3) of the Act. (On August 3, 1966 another charge was filed claiming an 8(a)(5) violation (29 U.S.C.A. 158(a) 5); these two charges became Case No. 12-CA-3577(1-2). On Friday, July 22, 1966 the **Union made a written demand** upon the Company for recognition **to which the Company that day replied denying,** in good faith, **the Union's majority status** and advising the Union to use the facilities of the National Labor Relations Board to determine the rights of the parties (A:5). The **Company** went further and as quickly as it could on the following work day, Monday, July 25th, **filed a Petition for Election** (12-RM-133)[6]

Notwithstanding all the above the Complaint (12-CA-3577(1-2)) issued and the cause proceeded for trial before a Trial Examiner on November 21, 1966, consuming 7 trial days.[7]

During the course of the proceedings, counsel for the Board issued a subpoena seeking to require Theodore

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[5]This state court injunction (A: 33-35), as modified (A: 35-38) is still in effect and the Company's claim against the Union for damages because of the illegal picketing and violence is yet to be tried.

[6]Supplemental Transcript of Record before this Court, page 10.

[7]It was after the trial and before a decision in 12-CA-3577(1-2) that another Complaint was filed by the General Counsel in Case No. 12-3697(1-2) on February 8, 1967 charging a violation of Section 8(a)(4) (29 U.S.C. 158(a)4) of the Act, which resulted in the entry of the second Board Order (A: 45-47), 170 N.L.R.B. No. 70, both of which Orders were the subject of the enforcement proceedings in the Court of Appeals.

Foster, individually, and **not as president** of Respondent company, to produce the earnings records of Company's employees and to testify; at that time Theodore Foster was under a criminal conspiracy information (R: 709) as a result of a criminal capias first obtained by the Union and Herman Gonzalez, with the alleged discriminatee, Gonzalez, as the principal prosecution witness (R: 709, 472, 473), Foster being charged for a conspiracy to violate the Florida right-to-work law; Theodore Foster had been bound over to the Criminal Court of Record in and for Dade County, Florida (R: 472). Counsel for Mr. Foster filed a Motion/Petition to Revoke the subpoena, and upon advice of counsel, Theodore Foster refused to produce the records sought or to testify; the **Trial Examiner refused to rule on the Petition to Revoke but instead retaliated by refusing to permit the use of the original time cards to establish the size and majority status** of the Union (the materiality of which was urged by Government counsel (R. 335-360). **The colloquy concerning subpoena, motion to dismiss, refusals and** the Trial Examiner's conduct is contained in pages 471 through 497, 534, 538[8] of the Record (R) in the Court of Appeals and this Court's attention is directed thereto, particularly pages 471-474, 483, 484 et al.

Because of the position taken by the Trial Examiner it became necessary for the president of the Company, Ted Foster, to seek and obtain a writ of habeas corpus and restraining order (rejected Exhibits Nos. 39 and 40, R: 883, 879; A: 39-41) where the Trial Examiner was personally enjoined from pursuing his insistence upon production of the earnings records; subsequently, during the

[8]The Trial Examiner ultimately, after much urging to rule, denied the petition to revoke (R: 538).

course of the hearing, after Theodore Foster was discharged[9] from any criminal liability as a result of the Union's and Gonzalez' self-help warrant in obtaining the criminal information against Foster, **effort on the part of the Company to comply with the subpoena was rejected and denied by the Trial Examiner** (R: 885, 886).

The Company, in spite of the background of violence and intimidation of 2 of its employees, on or about the picket line, **was not permitted to inquire into** the **violence occurring on Wednesday, July 20, 1966** (R: 276, 277, 278, 302, 345, 346, 365, 374). **nor the circumstances under which the signatures to the authorization cards were obtained, nor of the purpose of the cards** (R: 336, 277, 374, 398)[10] **nor into the credibility** of government witnesses (R: 277, 333, 398).[11]

However, the damage was done for it was against a background of violence, intimidation, threats and coercion that the Union was able to obtain, on the morning of Wednesday, July 20th (R: 147, 148, 632, 713), the signatures to most of whatever number of authorization cards were

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[9]*Foster* v. *Gilbert, et al.*, January 6, 1967, 264 Fed.Supp. 209.

[10]*N.L.R.B.* v. *Gissel Packing Company*, 89 S.Ct. 1918 (1969) 395 U.S. 575, *does not* pretend, in its adoption of the so-called Cumberland doctrine, to be applicable to employees who neither write nor speak English and who were never told the purpose of the cards, as can be easily gleaned from the record nor does *Gissel* sanction the obtaining of cards as a result of violence, duress and coercion.

[11]*Most of the employees of the Company* in the production unit sought were Spanish-speaking Latin Americans, who *neither read nor understood English*; at least 11 (Trujillo, R: 266; Paez, R: 245; Aguirre, R: 164; Beserva, R: 167; Marie M. De La Fe, R: 233; Soto, R: 273; Coyene, R: 304; Blanco, R: 308, Meller, R: 324; Lozo, R: 346; Sanchez, R:371; Armas, R: 430) of the production employees who testified requiring the use of an interpreter while the language of both Gonzalez (R: 727) and Diaz (R: 544) is limited even according to the standards set by the Trial Examiner.

ultimately obtained (apparently 35 in number), which, by some hokus pokus, the Trial Examiner made a determination was a majority of some 47 employees in the production unit (R: 30, 31, 39).[12]

Needless to say, the Board entered its Decision and Orders (A: 41-45; 45-47) and the Board brought the enforcement proceedings in the Fifth Circuit. The Court of Appeals, in its Opinion, recognized that there was a substantial conflict in evidence, reciting (A: 7):

> "A review of the record demonstrates that there was a substantial conflict in the evidence with the version of the facts presented by the Company's witness directly conflicting with the version presented by the Board's witnesses."

but refused to deny enforcement or to upset the findings, except as to the 8(a)(5) bargaining order, on the premises they were generally "bound by **credibility choice** made **by** the **Trial Examiner**" and refused to find bias and prejudice of the Trial Examiner in the first case in spite of the record. The Court of Appeals did, however, remand the Board's order to bargain and the underlying findings of a Section 8(a)(5) violation to the Board for further findings in the light of the case of **N.L.R.B.** v. **Gissel Packing Company**, supra.

It is the propriety of the enforcement of the alleged 8(a)(1)(3) and (4) violations *and the remand* which are the issues upon which the Petitioner seeks a writ of certiorari.

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[12]*The Company's position at all times was that there were at least 75 or 76 production employees in the unit at times material, and the Company voluntarily submitted 76 original time cards which the Trial Examiner refused to receive into evidence or hear testimony concerning* (R: 875-879, 884).

REASONS FOR ALLOWANCE OF THE WRIT

Most of the employees of the Company were Latins who did not speak, write or understand English.[13] **Gissel,** supra, is hardly applicable for the Supreme Court in its partial adoption of the rule in **Cumberland Shoe,** 144 N.L.R.B. 1268 could hardly have intended that the decision should cover cards where there is absolutely no meaning as to employees of the type involved here; indeed, this Court, in **Gissel,** cautioned against a "too-easy mechanical application of the Cumberland Shoe rule." The cards were not bilingual and the Fifth Circuit itself, in an election matter, recognized this type problem for in **Marriott-in-Flite Services** v. **N.L.R.B.,** 417 F.2d 563, the Fifth Circuit invalidated a representative election because of the failure to provide Spanish ballots for one-third of the voters, who spoke only Spanish, and recited that minimum standards of fairness must be met. The Board itself, or better, the Trial Examiner, in **Brancato Iron Works,** 170 N.L.R.B. No. 10, in finding that employer did not violate 8(a)(5) by refusing the Union's request to bargain, because the Union did not have majority status as claimed on basis of authorization cards, held invalid the authorization card of an employee who spoke Spanish and knew no English, since the general counsel failed to prove that the employee knew what he was signing when he signed the card or that he had authorized the Union to represent him. This Court has not held that objectivity is a hard and fast rule in circumstances of the ilk here. The Court, in **Gissel,** in Footnote 18 stated:

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[13]The Court recited in its Opinion that 11 of the 35 employees who signed authorization cards spoke only Spanish and were unable to understand either written or spoken English; actually the record reveals a vast majority of the employees neither spoke nor wrote English; the Court's reference to the number 11 (A: 10) was occasioned by virtue of the Company pointing out, in its brief, eleven (11) specific cases.

> " * * * We need only decide whether the Courts are reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was in fact set aside."[14]

But even of greater importance is the fact that it is obvious that the Union never, at any time, represented an uncoerced majority; because the authorization cards were obtained on the day of the picketing as a result of violence and coercion it became necessary for the Company to obtain an order of the Circuit Court in and for Dade County, Florida (A: 33-35).[15]

Without regard to all of the above, the majority status of the Union was never actually established. The Company, when it filed its petition for election, 12-RM-133, supra, on July 25, 1966, recited in paragraph 6(a) of the petition that the number of employees in the unit was 75. The Trial Examiner and the Board found a much smaller number of employees in a unit, to-wit: 43, supra. The Trial Examiner and Board, upheld by the Court, stated that the General Counsel was required to establish the size of the unit through secondary evidence. **Such is not the case.** *At all times the Company offered and sought to introduce the original records,* that is to say, the time cards B:8, footnote 8) which the Trial Examiner refused to receive in evidence or hear testimony concerning. (R: 875-879, 884).

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[14]The Company's RM petition for election was dismissed by the Regional Director after the entry of the Board Order.

[15]It is elementary that majority status obtained as a result of coercion is illegal and is, indeed, not majority status. Even the Board recognizes this (*Lerner Shops of Alabama, Inc.* 91 N.L.R.B. No. 22).

The Company requested the Trial Examiner to inspect the records seeking "an in camera" examination for the purpose of the Trial Examiner making a ruling on the petition to revoke (R: 492) and later, after the witness, Ted Foster, had exculpated himself as a result of the suit filed in Federal District Court, when the Company sought to establish the size of the unit by the evidence subpoenaed, the Trial Examiner, loud and clear informed the Company that it was no go, saying:

> "MR. LADWIG: *Correct. The record is clear, I am not seeking from Respondent now to produce these records. I am ruling that the company, through its counsel, persisted in its refusal to produce the records earlier, and even if the company now would like to produce these records, I would exclude them.*" (R: 885-886)[16]

The Board refused to permit testimony and excluded the offered evidence under the **Bannon Mills** doctrine, 146 N.L.R.B. 611, because the Company earlier had refused to produce records subpoenaed by the General Counsel.[17] The Trial Examiner, the Board and the Court misapplied the holding in **Bannon Mills, Inc.**, 146 N.L.R.B. 611 to the facts involved in this cause. Perhaps the best discussion of this is contained on pages 8 and 9 of the Petition to Rehear which the Petitioner here re-recites:

> In **Bannon Mills** the subpoena duces tecum and ad testificandum was directed to Harry Silver as president of Bannon Mills . . . unlike here.

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[16]Reference is made to pages 27 through 28 of the Brief with specific reference to Elizabeth Wagner and Mr. Silverman.

[17]No attempt to enforce the subpoena was under Section 11 of the Act (29 U.S.C. 161(2), 1965 (A: 13).

There was no claim of privilege in Bannon Mills, nor was its president, Silber, under a pending criminal charge; in the case at hand counsel for American Art produced for an in camera inspection the payroll records of its employees, but the Trial Examiner would not look at them.[18] In the case at bar the Company offered to produce the 76 time cards (R: 32). These 76 time cards were offered into evidence but refused (R: 36). The time cards were at all times available and before the hearing officer and some were even introduced into evidence (R: 875-876), but the hearing officer continually persisted in demanding earnings records so that it became necessary, as aforesaid, to obtain a writ of habeas corpus and order restraining the Trial Examiner (R: 1166-1167). The Trial Examiner was a party to the proceeding in the Federal District Court enjoining efforts to obtain records from Foster, and was dismissed only when he stated he would not attempt to elicit the information any further himself (R: 1239). After that he announced that he would not thereafter admit earnings records or any and other evidence even though Foster, by the action of Judge Mehrtens in the United States District Court, was then and there exculpated from any wrongdoing (see Respondent's brief previously filed herein.) See: App. 885-886.

[18]The Subpoena B-63553 called for earnings records. American Art Industries has no earnings records. It is presumed General Counsel meant payroll records; nor does it appear that a petition to revoke was filed in *Bannon Mills*, as in the instant case (R: 32). It does appear, however, that there were 332 cards in the racks at Bannon Mills plant.

As heretofore stated American Art could no longer offer any evidence. The Trial Examiner ignored the fact that the time cards were the original records dated and signed by the employees and were the records from which all other records were of necessity taken. It is obvious that the best evidence obtainable to prove the disputed fact of the number of employees was not adduced. Time cards were like the "tally sheets" referred to in the case cited by this Court: **Sylvania Electric Products, Inc.** v. **Flanagan,** 352 F.2d 1005, Syllabus 1-5, at pages 1007-1008. It appears, affirmatively, that the oral evidence allegedly adduced or attempted to be adduced by the General Counsel could not even get in the back door of a J.P. court. All the rules of evidence were ignored, not only in the failure to receive the time cards but the subsequent failure to receive the employment records. See: **United States** v. **Wood,** 39 U.S. 430, which holds that secondary or unfair evidence shall not be substituted for evidence of higher nature which case admits to. (See also: **Cooke** v. **Woodrow,** 9 U.S. 13, **Brooks** v. **Marbury,** 24 U.S. 78, **Tayloe** v. **Riggs,** 26 U.S. 591, and **Illinois Central Railroad Co.** v. **Norfolk & Western Railroad Co.,** supra.

This very Court, in **N.L.R.B.** v. **Capital Fish Co.** 294 F.2d 868, at page 872, stated:

> "In the district courts improper exclusion of evidence, if prejudicial, will cause a reversal of the judgment. Cervin v. W. T. Grant Co.,

> 5 Cir., 1938, 100 F.2d 153. No special characteristics of an administrative hearing justify the exclusion of evidence which it would be error to exclude in a court trial, and in several cases N.L.R.B. orders have been reversed for the wrongful exclusion of evidence."
>
> The Court then cited the cases of **N.L.R.B. v. Adhesive Products Corp.**, 258 F.2d 403, **N.L.R.B. v. Tennessee-Carolins Transportation, Inc.**, 226 F.2d 743 and **N.L.R.B. v. Burns**, 203 F.2d 438. For a later case see the **Miami Coca-Cola Bottling Co.** case, supra. The facts in **Bannon Mills**, supra, are not controlling in this action. The Trial Examiner, by his exclusions and restrictions, prevented the fairness required in an administrative hearing and the holding in Bannon was improperly applied to the instant case.[19]

The decision in the case at bar is obviously in conflict with Sylvania Electric Products, Inc. v. Flanagan, 352 F.2d 1005, a decision out of the First Circuit; the witness, Theodore **Foster**, president of the Company, refused to produce and testified against himself[20] and **filed a petition**

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[19]It is never really claimed that the Trial Examiner, in the second action (12-CA-3697(1-2) was prejudiced except by osmosis, that is to say, reliance upon the first Trial Examiner, and Board Decision.

[20]See *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964) where the Court held *"The privilege* (against self-incrimination) *can be claimed* in any proceeding, be it *criminal*, or civil, *administrative or judicial*, investigatory or *adjudicatory*. * * * it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used." In re Gault 387 U. S. 1 at 47, 87 S.Ct. 1428 at 1454, 18 L.Ed.2d 527 (1967); Murphy v. Waterfront Commission 378 U. S. 52 at 94, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

to revoke the subpoena which was directed to him individually. The Court stated that it is elementary that the officer of a corporation could not assert his privilege of self-incrimination under the Fifth Amendment to prevent the production of books and records of the corporation of which he is an officer, citing **United States v. White,** 322 U.S. 694, 700-701 (1944); but *the Court overlooked the simple fact that no subpoena was directed to the witness, Foster, as an officer, director or representative of the corporation but was directed to him solely;* ergo, the case at hand is in conflict with the decisions of this Court, to-wit: **Curcio v. United States,** 354 U.S. 118, 77 S.Ct. 1145 and **Brussel v. United States,** 90 S.Ct. 2 (October 10, 1969). The subpoena B-63553 (General Counsel's Exhibit 4(a)(1), R: 1110-1111), was a **subpoena** duces tecum **and ad testificandum** directed solely to Ted Foster as an individual. . . . and not as an officer. Indeed, the subpoena was received by one, I. Osborne (R: 479), and while counsel admits the receipt thereof, objection was made to its introduction (R: 479).

In White, supra, page 250, the **marshall served a subpoena** duces tecum **upon the president** of the union **as the president;** nor was there in White, supra, any effort or an indicated intention to examine him personally as a witness, while the Foster subpoena was one also of ad testificandum; it was the obvious intention to require *Foster* to testify even though he *was,* then and there at that time, *under a criminal charge filed by one of the alleged discriminatees,* Gonzalez, *at the behest of the Union* (see Company's brief, page 8). **The subpoena in White, supra, was directed to the union.**

Most seemingly, therefore, as a matter of law, under the facts of this case, Ted Foster would be entitled to his constitutional privilege. Foster would be entitled to the same immunity as granted in Curcio v. U. S. 354 U.S. 118, 77 S.Ct. 1145 (1957); only recently the Supreme Court, in Brussel v. U. S. 90 S.Ct. 2 (October 10, 1969), in releasing Brussel, recited:

> "Curcio v. United States, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957), raises serious questions concerning the validity of the contempt order. In that case, a union official, admittedly the custodian of the union's records, refused on Fifth Amendment grounds to reveal their whereabouts to the grand jury. This Court upheld the assertion of the privilege holding that the corporate records exception applied only to the records themselves, not to testimony concerning them, and reiterating the established principle that **"all oral testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege."** Id., at 124, 77 S.Ct. at 1150, citing Shapiro v. United States, 335 U.S. 1, 27, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948)." (Emphasis supplied)

The privilege against self-incrimination should be accorded a liberal construction. (**Spevack v. Klein,** 87 S.Ct. 625 (1967), 385 U.S. 511), and such privilege protects any disclosure which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used (**Application of Galt,** 87 S.Ct. 1428, 387 U.S. 1. See also: **Ballmann** v. **Fagin,** 26 S.Ct. 212, 200 U.S. 186, where the Court justified a refusal to produce under the claim of privilege.

The above with regard to Ted Foster should be considered as a part of the matters and things referred to supra re **Bannon** and to the paragraphs following with regard to substantial evidence.

The Trial Examiner not only excluded credible evidence, particularly with regard to violence in connection with the obtaining of authorization cards, but actually acted in a manner to deny due process and equal protection under the law to the Company. The matters and things regarding the conduct of the Trial Examiner are set out throughout the Petitioner's Brief. Particular reference is called to pages 8, 10, 27-29, 35, 37 and 47 thereof. In the interest of brevity Petitioner will not restate the matters and things referred to on those pages.

The decision of the Fifth Circuit appears to be in conflict with the decisions of the Sixth Circuit in **Hagopian & Sons, Inc. v. N.L.R.B.**, 395 F.2d 947, and **N.L.R.B. v. Elias Brothers Big Boy, Inc.**, 327 F.2d 421. In **Hagopian**, supra, the Court, on page 953, Syllabus 12, stated:

> "(12) In our opinion the overbearing manner of the Trial Examiner and his apparent preconceived notion as to the theory of the complaint deprived the Respondent of a fair hearing. **On numerous occasions** the **Examiner assumed the questioning of the witnesses and refused to allow the Respondent's counsel an opportunity to develop his theory of the case.** Particularly, the Examiner refused to accept any evidence concerning previous changes in the work schedule at the request of the employees. From such evidence the Respondent might have been able to

show an established company rule in presenting such grievances. **We find that the Respondent was prejudiced by the refusal to admit this evidence.** Cf. National Labor Relations Board v. Blase, 388 F.2d 327 (9th Cir. 1964). **An impartial trier of fact who is unconcerned in the result of the case is the essence of fair administrative adjudication. National Labor Relations Board v. National Paper Co.,** 216 F.2d 859 (5th Cir. 1954). Enforcement of the Board's order is denied. * * * *" (Emphasis supplied)

What happened in **Hagopian,** supra, happened here. The record is replete with such incidences as referred to in **Hagopian.** It is obvious that this decision is in conflict with this Court's decision in **Universal Camera Corporation** v. **N.L.R.B.** 71, S.Ct. 456[21] where, at page 464 the Supreme Court held:

"The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

and **N.L.R.B.** v. **Columbian E. & Stamping Co.,** 306 U.S. 292 59 S.Ct. 501, where this Court, in Syllabus (6), (7) stated:

"(6, 7) Section 10(e) of the Act provides:

" * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive". But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, ~~that is~~ af-

[21]See Brief, pp. 48-50.

fording a substantial basis of fact from which the fact in issue can be reasonably inferred. Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965: Consolidated Edison Co. of New York v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126; Appalachian Electric Power Co. v. National Labor Relations Board, 4 Cir. 93 F.2d 985, 989; National Labor Relations Board v. Thompson Products, Inc., 6 Cir., 97 F.2d 13, Ballston-Stillwater Knitting Co. v. National Labor Relations Board, 2 Cir., 98 F.2d 758, 764. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," Consolidated Edison Co. of New York v. National Labor Relations Board, supra, 59 S.Ct. 217, **and it must be enough to justify if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.** See Baltimore & O.R.R. Co. v. Groeger, 266 U.S. 521, 524, 45 S.Ct. 169, 170, 69 L.Ed. 419; Gunning v. Cooley, 281 U.S. 90, 94, 50 S.Ct. 231, 233, 74 L.Ed. 720; Appalachian Electric Power Co. v. National Labor Relations Board, supra, page 989 of 93 F.2d." (Emphasis supplied)

This is one of the rare instances where this Court should intervene and grant the writ because "the standard appears to have been misapprehended or grossly mis-applied". 71 S.Ct. at 466.

A lengthy discussion of the Trial Examiner's ineptness and the failure of the Board and the Court to apply the proper principles of substantial evidence is contained in paragraph numbered 2, pages 3 through 7, of the Petition for Rehearing. Reference is made thereto rather than to reprint herein. *Said Petition for Rehearing, in toto, is made a part hereof by reference as if fully set out herein.*

It further appears that inasmuch as the employer here was denied an equal opportunity to cross-examine adverse witness as to evidence presented, this decision is in conflict with **Wheeler** v. **N.L.R.B.** (C.A.D.C. 1963), 314 F.2d 260, (B:49, 50).

As for the 8(a)(4) violation, this Court is referred again to the Petition for Rehearing, paragraph 4, where it was recited:

> "Petitioner further points out that the Court, in holding that American Art Industries had committed a violation of Section 8(a)(4) of the Act by discharging the 2 employees because they testified at the previous hearing, overlooked the case of **N.L.R.B. v. Walton Manufacturing Company**, 369 U. S. 404, 82 S.Ct. 853 (1962) where the Court held that the test as to substantiability of evidence in all Labor Board cases is the same; the Supreme Court went on to hold, in **Walton,** a back-pay case, that employers statements under oath that union membership or activity was not ground for discharge must be believed, **unless there is impeachment of employer of substantial contradiction** and that if there are circumstances that raise doubts they must be inconsistent with positive sworn evidence on exact point.

HERE FOSTER WAS ASKED:

Did you lay off the 2 employees because of Union activity or because they testified before the Board? (R: 1247)

FOSTER ANSWERED:

"No, we did not lay them off because of any union activity or any kind of testimony."[22]/ (R: 1247)

In any event, neither Mosely (R: 1178-1189, 1301, 1302), nor Trujillo (R: 1189-1222, 1285, 1401), **nor anyone else, ever contradicted in the slightest or impeached the testimony of Foster,** supra. (R: 1247)

It appears that there was not substantial evidence to support the findings based upon the above and foregoing and a re-examination of **Universal Camera Corp.** v. **N.L.R.B.** 340 U.S. 474, 71 S.Ct. 436 supports the position of American Art Industries, Inc. While this case has been remanded to the Board for reconsideration in the light of **Gissel,** supra, it is suggested that remand was not necessary, and that the Court should reconsider even its remand with regard to the 8(a)(5) charge and hold that a bargaining order is improper.

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[22]Foster went on to say: Nor were they fired (R: 1248). Trujillo could not read nor write in any language (R: 1294); he spoke only Spanish and did not understand English (R: 1189), and there was no longer any employee in the plant who could speak to him in Sponish (R: 1211-1220). There was a communication gap (R: 1231-1232). Upon their return to work there was a time card for both Mosely and Trujillo.

So the record is clear that there was no impeachment of Company testimony, nor **any** circumstances which raised doubts inconsistent with the positive sworn evidence of Ted Foster; this, too, is in conflict with **N.L.R.B.** v. **Walton Manufacturing Company,** supra.

CONCLUSION

For the above reasons Petitioner respectfully requests this Court to grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the Decision and Judgment herein, and upon review, it is suggested that the Opinion, Decision and Judgment reviewed be reversed.

Respectfully submitted,

JOSEPH A. PERKINS
Attorney for Petitioner
M-107 Biscayne Building
Miami, Florida 33130

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Petition for Writ of Certiorari were mailed to:

ARNOLD ORDMAN, ESQUIRE
General Counsel
National Labor Relations Board
Washington, D.C. 20570

HONORABLE ERWIN N. GRISWOLD
Solicitor General of the United States
Office of the Solicitor General
Washington, D.C.

EARL W. WADSWORTH, *Clerk*
United States Court of Appeals
Fifth Circuit
400 Royal Street
New Orleans, Louisiana

this_____day of January, 1970.

JOSEPH A. PERKINS
Attorney for Petitioner

APPENDIX

APPENDIX

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 26543

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

AMERICAN ART INDUSTRIES, INC.,
Respondent.

Application for Enforcement of Orders of the National Labor Relations Board (Florida Case)

(September 5, 1969)

Before WISDOM, MORGAN, Circuit Judges, and DAVIS*, Court of Claims Judge.

MORGAN, Circuit Judge: This case arises out of a petition brought by the National Labor Relations Board (hereinafter, the Board) pursuant to Section 10(e) of the National Labor Relations Act, as amended, 29 US.C. § 151, *et seq.*, (hereinafter, the Act), for the enforcement of two orders against the respondent, American Art Industries,

*Judge Oscar H. Davis, U. S. Court of Claims, Washington, D. C. sitting by designation.

(hereinafter, the Company). In the first proceedings before the Board, reported at 166 NLRB No. 199, the Board found that the Company had violated Section 8(a) (1) of the Act by coercively interrogating its employees, threatening to close its plant if a union was brought in, promising benefits to undermine the union's drive, and threatening to discharge any employee who joined in a strike against the Company. The Board also found that the Company violated Section 8(a) (3) and (1) of the Act by discriminately discharging four employees because of their organizational activity on behalf of the union. Finally, the Board found that, since July 22, 1966, the Company has refused to recognize and bargain with the Union. General Sales Drivers and Allied Employees, Local No. 198, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which represented a majority of its employees in an appropriate bargaining unit, in violation of Section 8(a) (5) and (1) of the Act. In the second proceeding before the Board, reported at 170 NLRB No. 70, the Board found that the Company had violated Section 8(a) (4) and (1) of the Act by discharging two employees because they had testified in behalf of the General Counsel in the prior proceeding.

Pursuant to these findings, the Board ordered the Company to cease and desist from the unfair labor practices found to have been committed and in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. By way of affirmative action, the Board ordered the Company to bargain collectively with the Union as the exclusive representative of all employees in the bargaining unit upon request, to offer reinstatement to those striking employees who made an unconditional request for reinstate-

ment, to reinstate the unlawfully discharged employees and make them whole for wages lost as a result of their having been discharged, and to post appropriate notices.

The facts of the case are as follows: On July 13, 1966, an employee of the Company, one Jesus Diaz, obtained approximately fifty authorization cards from the Union's representative in order to begin a union organizing drive at the Company's plant. Some of these cards were given to three other employees of the Company, Reverend J. D. Mosely, Carlos Paez, and Herman Gonzalez, who were also participating in the union organizing drive. On July 18th, the four organizers began making solicitations with the Company's employees for membership in the Union.

On July 19th, Joe Foster, the Company's vice-president, had conversations with three of the organizers at their work stations in the plant. In these conversations, Joe Foster inquired whether the organizers had "heard anything about the Union", and stated to each that if the union did come in, the plant would be closed.

During the lunchtime break on July 19th, Ted Foster, the president of the Company, had a conversation with about twelve of the Company's employees who were sitting on the ground outside the plant eating their lunch where he told them of his intention to install lunch facilities at the plant.

Jesus Diaz testified that later in the afternoon he overheard a conversation between Ted Foster and his brother Joe inside the plant to the effect that authorization cards had been given out and that the union organiz-

ers would be dismissed because the work was slow.[1] Shortly before the close of the business day, the four organizers were told that business was slow and that the Company was being forced to close some departments and that they were being laid off.

On the following morning, the four organizers returned to the Company's parking lot to collect signed authorization cards from some employees and to distribute unsigned cards to others. The word spread that the four men had been dismissed and the employees began to congregate in the parking lot. Mr. and Mrs. Ted Foster then arrived at the plant and went over to the assembled employees. Mrs. Foster spoke to the employees and, although there is conflicting testimony as to her exact words, she said in substance that if they did not begin working by 8:00 a.m., they would be fired. The assembled employees responded to this by shouting that they wanted the union and then went to the union hall to take a vote, the purpose of which is unclear, and then returned to picket the plant, carrying signs which read: "Employees of American Art on strike because of unfair labor practices. Teamsters Union 198".

On July 21st, the Company invited all of the strikers, including the four laid-off organizers, to return to work by posting notices at the plant and by sending each striker a copy of the notice by mail. The strike, however, continued until the first proceeding came before the Board in November of 1966.

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[1]According to Diaz, the conversation went as follows:
"Joe, I thought this was the beginning of everything, that they were doing some talking, but they have given out the cards all over the place and we've got to get rid of them."

Then later in the conversation:
"We will say its quiet and it is slow." (App. 103)

On July 22nd, the Union made a written demand for recognition, claiming to represent a majority of the Company's production and maintenance employees, to which the Company replied, denying the Union's majority status and advised the Union to "use the facilities of the National Labor Relations Board to determine the rights of the parties".

In response to a Union application for reinstatement on behalf of thirty-six named employees, the Company, on November 7, 1966, made an unconditional offer to the employees to return to their old jobs. Two employees, J. D. Mosely and Horatio Trujillo, accepted the Company's offer and reported for work on the 15th and 16th of November, respectively. Both men were subpoenaed and testified as witnesses for the General Counsel a few days after resuming their work with the Company. When they reported for work after testifying, they were told that there was no work for them and that they would be called when any work became available. Neither of the men were called back to work.

The Company resists enforcement of the Board's orders on two main grounds: *first*, that the Company was denied a fair trial by the bias and prejudice of the trial examiner; and, *secondly*, that findings of the Board are not supported by substantial evidence on the record as a whole.

The Company asserts in its brief several manifestations of the alleged bias and prejudice of the trial examiners in the two proceedings, but after careful consideration of the records in each proceeding, we cannot say

> that the proceedings were characterized by full expedition or determined purpose to reach a predetermined end, or were attended with suppressive and exclusionary rulings and actions designed to prevent and preventing a fair trial. *Continental Box Company v. N.L.R.B.*, 5 Cir., 1940, 113 F.2d 93.

On the contrary, we feel the two trial examiners' "conduct . . . comported with the high standards that a litigant has a right to expect under the Labor Act and under the Administrative Procedure Act." *N.L.R.B.* v. *Transport Clearings, Inc.*, 5 Cir., 1962, 311 F. 2d 519. The fact that the trial examiners and the Board generally credited the Board's witnesses and discredited those of the Company is not enough to establish that the hearing was unfair because of bias and prejudice. See *N.L.R.B.* v. *Bush Hog, Inc.*, 5 Cir., 1968, 405 F. 2d 755, 756. Likewise, a trial examiner has the right to examine and cross-examine witnesses in order that the facts are clearly and full developed. *N.L.R.B.* v. *Bryan Manufacturing Co.*, 7 Cir., 1952, 196 F. 2d 477. Finally, it is not error for a trial examiner to take judicial notice of a prior proceeding before the Board involving the same parties as in the present action, as was done in the second proceeding. *N.L.R.B.* v. *Reed & Prince Manufacturing Co.*, 1 Cir., 1953, 205 F. 2d 131, 139-40. The Company's contention that Trial Examiners Ladwig and Kessel were biased and prejudiced against the Company is without merit.

The Company, in support of its contention that the findings of the trial examiners and the Board were not supported by the substantial evidence in the record taken as a whole, argues that we should decline to follow the

action of the trial examiner in crediting and discrediting the testimony of the various witnesses. A review of the record demonstrates that there was a substantial conflict in the evidence, with the version of the facts presented by the Company's witnesses directly conflicting with the version presented by the Board's witnesses. The trial examiner consequently was faced with the task of deciding which side's version to believe. Although in a proper case the Court may decline to follow the action of the examiner in crediting and discrediting testimony even though the Board has adopted the examiner's findings, *N.L.R.B.* v. *Elias Brothers Big Boy, Inc.*, 6 Cir., 1964, 327 F. 2d 421, 426, we are generally bound by the credibility choices made by the trial examiner. *Nabors* v. *N.L.R.B.*, 5 Cir., 1963, 323 F. 2d 686, *accord N.L.R.B.* v. *Monroe Auto Equipment Co.*, 5 Cir., 1968, 392 F. 2d 559, 560-61; *N.L.R.B.* v. *Waycross Sportswear, Inc.*, 5 Cir., 1968, 391 F.2d 294. The Company relies heavily on inconsistencies in the testimony of the Board's witnesses on cross-examination by the Company's counsel, but these inconsistencies deal largely with collateral matters and do little more than demonstrate the fallibility of memory and well known difficulties in judicial proof. The trial examiner was faced with a substantial conflict in the evidence and resolved this conflict by generally crediting the Board's witnesses and discrediting the Company's witnesses. Even in the light of the inconsistencies as to collateral matters in the testimony of the Board's witnesses, we cannot say that for this reason the findings were not supported by the substantial evidence in the record taken as a whole.

The Company argues that the interrogation of the three employee-organizers by the Company vice-president Joe Foster on July 18, 1966, was not a coercive interroga-

tion as prohibited by Section 8(a) (1) of the Act. The Company rests its position on the case of *Mel Croan Motors, Inc.* v. *N.L.R.B.*, 5 Cir., 1968, 395 F.2d 154, where the Court held that, in the absence of a background of employer hostility and discrimination, interrogation which did not appear to be seeking information on which to base reprisals and which was not in itself threatening did not violate Section 8(a) (1) of the Act.[2] However, the facts in the present situation are clearly distinguishable from the *Mel Croan* situation in that Joe Foster not only inquired as to whether the organizer-employees knew about the union organizing drive, but went on to threaten to close the plant if the union was brought in. The present situation is controlled by our decision in *Reading & Bates, Inc.* v. *N.L.R.B.*, 5 Cir., 1968, 403 F.2d 9, where we held that when interrogation is accompanied by implied or express threats of reprisal the Board may conclude that the employer intended to interfere with his employee's right of self-organization in violation of Section 8(a) (1). See also *N.L.R.B.* v. *Goodyear Tire & Rubber Company Retread Plant*, 5 Cir., 1968, 394 F. 2d 711, 712.

We have carefully reviewed the transcript of the proceedings in this case and find that substantial evidence on the record as a whole in all other respects supports the Board's findings that the Company violated Section 8(a) (1) of the Act by coercively interrogating and threatening its employees (*Reading & Bates, Inc.*, v. *N.L.R.B.*, supra; *N.L.R.B.* v. *Big Three Welding Equipment Co.*, 5 Cir., 1966, 359 F. 2d 77, 79; and *N.L.R.B.* v. *Almeida Bus*

[2]In *Mel Croan*, a supervisor asked "who started it and how it got started" upon being confronted by two employee representatives immediately after an employee meeting, which question they did not answer.

Lines, Inc., 1 Cir., 1964, 333 F. 2d 725, 729) and by promising benefits in an attempt to undermine the union organizing drive (*N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964), and *N.L.R.B.* v. *Tidelands Marine Service, Inc.*, 5 Cir., 1964, 339 F.2d 291, 293); that the Company violated Section 8(a) (3) and (1) of the Act by discharging four of its employees because they engaged in union activity (*N.L.R.B.* v. *Dell*, 5 Cir., 1960, 283 F. 2d 733, 736); that the Company violated Section 8(a) (4) and (1) of the Act by discharging two of its employees because they testified at a Board hearing (*N.L.R.B.* v. *American Pad & Textile Co.*, 5 Cir., 1966, 357 F. 2d 742, and *N.L.R.B.* v. *R.C. Can Co.*, 5 Cir., 1965, 340 F. 2d 433, 434). The Board's finding that the Company violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union will be discussed below.

In considering the correctness of the bargaining order issued by the Board in this case, we face the initial question of whether the finding that the Union represented a majority of the Company's employees is supported by the substantial evidence in the record taken as a whole. This question further breaks down into two specific issues: *first*, whether the authorization cards signed by the Company's Spanish-speaking employees were valid; and, *secondly*, whether the trial examiner had sufficient evidence to find that the Company employed a total of forty-three employees at the time of the bargaining demand in light of the fact that the trial examiner excluded all evidence offered by the Company going to the size of the bargaining unit at the time the Union's demand was made because of the Company's refusal to produce subpoenaed employee-earning records while the General Counsel was making his case.

The first of these issues requires a reconsideration of our decision *N.L.R.B.* v. *Texas Electric Cooperative Inc.*, 5 Cir., 1968, 398 F. 2d 722, in light of the recent Supreme Court decision of *N.L.R.B.* v. *Gissel Packing Co.*, —— U.S. ——, 1969 [Nos. 573, 691 and 585, June 16, 1969]. Eleven of the thirty-five employees who signed authorization cards spoke only Spanish and were unable to understand either written or spoken English. The Company attacks the validity of the authorization cards signed by these employees on the ground that there was no showing that they understood what consequences would flow from the act of signing the cards. In so doing, the Company relies on *N.L.R.B.* v. *Texas Electric Cooperative, Inc.*, supra, which dealt with a situation where several of the employees who had signed authorization cards were illiterate and the authorization cards were not read to them when they signed. There the Court held that when the employer introduces evidence to indicate that its employees did not understand what they were signing, the Board must establish by a preponderance of the evidence that the signer of the card did, in effect, what he would have done by voting for the union in an election. The Court further held that the trial examiner applied an erroneous standard to the facts by precluding a probe into the *subjective intent* of the challenged signers.

Our decision in *Texas Electric* in turn relies on *N.L.R.B.* v. *Southland Paint Company*, 5 Cir., 1968, 394 F. 2d 717, and a long line of cases. See, *e.g.*, *Engineers & Fabricators* v. *N.L.R.B.*, 5 Cir., 1967, 376 F. 2d 482, and *N.L.R.B.* v. *Peterson Bros., Inc.*, 5 Cir., 1965, 342 F. 2d 221, rejecting the Board's *Cumberland Shoe* doctrine, 144 NLRB 1263 (1963), enforced 6 Cir., 1965, 351 F. 2d 917. The National Labor Relations Board took the position

in *Cumberland Shoe* that if the authorization card is itself unambiguous, that is, if the card states on its face that the signer authorizes the union to represent the employee for collective bargaining purposes and not to seek an election, it will be counted without any inquiry into what the subjective intent or understanding of the employee was in signing unless it is proved that the employee was told that the card was to be used solely for the purposes of obtaining an election. In rejecting the *Cumberland Shoe* doctrine, we took the position that when cards are challenged because of alleged misrepresentations in their procurement, the burden is on the General Counsel to probe into the subjective intent of the signers and show that it was their intent to authorize union representation. *Engineers & Fabricators, Inc.* v. *N.L.R.B.*, supra, at 487.

In *N.L.R.B.* v. *Gissel Packing Co.*, supra, the Supreme Court adopted the *Cumberland Shoe* doctrine and thereby overruled the position we had previously taken. See *N.L.R.B.* v. *American Cable Systems, Inc.*, 5 Cir., 1969, ____ F.2d ____ [No. 25,358, July 18, 1969]. In the light of these decisions, we find that since the authorization cards were unambiguous on their face and that at no time was an employee told that the cards were to be used solely for obtaining an election, they were valid and properly counted in determining whether the Union represented a majority of the Company's employees when the bargaining demand was made, and the fact that the eleven employees were Spanish speaking was irrelevant. Accordingly, there was no error in the trial examiner's refusal to allow the Company's counsel to "probe into the subjective intent" of the employees in signing the authorization cards.

The Company contends that the trial examiner committed error by refusing to admit any evidence offered by the Company which would go toward proving the total number of employees on the Company's payroll when the bargaining demand was made. We hold that the trial examiner in no way abused his discretion in excluding this evidence, and that the trial examiner's finding that the Union represented a majority of the Company's employees on the date of the demand is supported by the substantial evidence taken as a whole. The General Counsel caused a subpoena duces tecum to issue for the production of the employee-earnings records kept by the Company for the week of July 19, 1966, and for two months preceding. The Company's motion to quash the subpoena was denied. Nevertheless, the Company refused to produce the subpoenaed records on the ground that they would tend to incriminate the president of the Company who was under a criminal charge arising out of the labor unrest at the Company's plant. No attempt to enforce the subpoena was made under Section 11 of the Act. See 29 U.S.C. § 161(2) (1965). However, in the presentation of its own case, the Company attempted to introduce what it alleged to be the time cards punched by its employees for the week of July 19, 1969, and other testimony going to the size of the bargaining unit. This evidence was excluded under the *Bannon Mills doctrine, 146 NLRB* 611 (1964), on the ground that business records of the Company, which would have conclusively established the size of the bargaining unit, had been subpoenaed by the General Counsel and because of the Company's refusal to produce these records, the General Counsel had been required to establish the size of the bargaining unit through secondary evidence.

It is elementary that an officer of a corporation cannot assert his privilege against self-incrimination under the Fifth Amendment to the Constitution to prevent the production of the books and records of the corporation of which he is an officer. See *United States* v. *White*, 322 U.S. 694, 700-701 (1944). Thus, the Company's contention that the earning records of its employees were inadmissible because they would tend to incriminate the president of the Company is without merit.

The Board, on the other hand, argues that the earning records of the Company's employees were the best evidence available to prove the number of employees in the bargaining unit (see *Sylvania Electric Products, Inc.* v. *Flanagan*, 1 Cir., 1965, 352 F. 2d 1005, 1007-08, and *N.L.R.B.* v. *International Union of Operating Engineers, Local 12*, 9 Cir., 1957, 243 F. 2d 134) and that since the Company had deliberately withheld this evidence from the General Counsel in the face of a subpoena duces tecum issued by the Board under Section 11 of the Act, it should not be allowed to later produce evidence of a secondary nature to prove what could have been conclusively established if the subpoena had been honored. *Bannon Mills, Inc.*, supra, at 613. We agree. Once the Company refused to honor the subpoena duces tecum and thereby made it necessary for the General Counsel to establish the size of the bargaining unit through secondary evidence, it would have been inequitable to allow the Company to contradict this evidence with more secondary evidence while the Company, at all times, had in its possession the subpoenaed earning records which would have been conclusive and refused to produce them. In order to maintain the integrity of the hearing process, the trial examiner had, under the circumstances, little choice but to refuse to admit the

secondary evidence as to the alleged size of the bargaining unit proffered by the Company in the presentation of its case.

We therefore find that the Board's finding that the Union represented the majority of the employees in the appropriate bargaining unit is supported by the substantial evidence in the record taken as a whole.

The last major issue we face is the propriety of the bargaining order issued by the Board as a remedy for the Company's refusal to bargain with the Union in violation of Section 8(a) (5) of the Act. This matter is controlled by the recent Supreme Court decision of *N.L.R.B.* v. *Gissel Packing Company*, supra, and the Fifth Circuit Court's decision in *N.L.R.B.* v. *American Cable System*, supra. Under these decisions, we are constrained to deny enforcement of the order to enter collective bargaining and remand for further findings.

The Board found that the Company's independent unfair labor practices in violation of Sections 8(a) (1) and (3) demonstrated that the Company's refusal to bargain with the Union on the basis of authorization cards was not motivated by a "good faith doubt" as to the Union's majority status. This finding led the Board to the conclusion that the Company's refusal to bargain was in violation of Sections 8(a) (5) and (1) and that a bargaining order was the appropriate remedy.

Under the *Gissel* and *American Cable* decisions, the Board may issue a bargaining order where a union had valid authorization cards from a majority of the employees in an appropriate unit and where the Company's unfair

labor practices were serious enough to "have the tendency to undermine majority strength and impede the election process". *Gissel*, supra, 23 L.Ed. 2d at 578. Before determining that a bargaining order is the appropriate remedy, however, the Board must "take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future". *Id.* In *American Cable* this Court held that the Board, prior to issuing a bargaining order, must find that:

> "(a) the union had valid authorization cards from a majority of the employees in an appropriate bargaining unit; (b) the employer's unfair labor practices, although not 'outrageous' and 'pervasive' enough to justify a bargaining order in the absence of a card majority, were still serious and extensive; (c) 'the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight'; and (d) employee sentiment can best be protected in the particular case by a bargaining order."

Since the Board made no findings on these points and since it is not appropriate for this Court to make such findings, we remand the case to the Board for further adjudication.

The Board's order as far as it concerns American Art Industries' violations of Sections 8(a) (1), (3) and (4) is ENFORCED. As to the Board's bargaining order and the underlying findings of a Section 8(a) (5) violation, ENFORCEMENT IS DENIED AND THE CASE IS REMANDED FOR FURTHER FINDINGS.

[TITLE OMITTED]

No. 26543

Filed Oct. 8, 1969.

JUDGMENT

Before: Wisdom, Morgan, Circuit Judges, and Davis*, Court of Claims Judge.

THIS CASE came on to be heard upon the application of the National Labor Relations Board for enforcement of its order in Board Case No. 12-CA-3577 (1-2) dated July 31, 1967, and its order in Board Case No. 12-CA-3697 (1-2) dated March 20, 1968. The Court heard argument of respective counsel on May 29, 1969, and has considered the briefs and transcripts of record filed in these cases. On September 9, 1969, the Court, being fully advised in the premises handed down its opinion granting in part and denying in part enforcement of the Board's order in Case No. 12-CA-3577 (1-2) and remanding the said case to the Board with respect to the 8(a) (5) violation for further findings consistent with the Court's opinion; and granting full enforcement of the Board's order in Case No. 12-CA-3697 (1-2). In conformity therewith it is hereby

ORDERED AND ADJUDGED by the Court that American Art Industries, Inc., its officers, agents, successors and assigns, with respect to Case No. 12-CA-3577 (1-2), shall:

1. Cease and desist from:

*Judge Oscar H. Davis, U. S. Court of Claims, Washington, D. C. sitting by designation.

(a) Discharging or otherwise discriminating against any employee because of his membership in or his activities on behalf of General Sales Drivers and Allied Employees, Local No. 198, or any other labor organization.

(b) Threatening to close down its plant if a union comes in.

(c) Threatening to discharge employees for engaging in protected concerted activities.

(d) Promising any benefits to discourage support of a union.

(e) Coercively interrogating employees concerning union activities.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon application, offer to its striking employees reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(d) Make J. D. Mosley, Herman Gonzalez, Jesus Diaz, and Carlos Paez whole in the manner set forth in the Section of the Trial Examiner's Decision entitled "The Remedy."

(c) Notify the above-mentioned employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in ac-

cordance with the Selective Service Act and Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this Judgment.

(e) Post at its plant in Miami, Florida, in both Spanish and English copies of the attached notice marked "Appendix." Copies of such notice, on forms provided by the Regional Director for Region 12, (Tampa, Florida), after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the said Regional Director, in writing, within 10 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED AND ADVISED by the Court that enforcement of the Board's order in Case No. 12-CA-3697 (1-2) directed against American Art Industries, Inc., its officers, agents, successors and assigns in said proceeding be enforced, and that American Art Industries, Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: OCT. 8, 1969

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Judgment of the United States Court of Appeals enforcing in part an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL OFFER to our striking employees, upon their application, reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employees hired on or after July 20, 1966, to replace them, and we will make each employee whole for any loss of pay suffered by him as a result of our failure to reinstate him within 5 days after his application.

WE WILL MAKE Rev. J. D. Mosley, Mr. Herman Gonzalez, Mr. Jesus Diaz, and Mr. Carlos Paez whole for earnings they have lost since July 19, 1966, as a result of their discriminatory discharge.

WE WILL NOT threaten to close down our plant if a union comes in.

WE WILL NOT threaten to discharge employees for supporting a union.

WE WILL NOT make promises of benefits to our employees to discourage support of a union.

WE WILL NOT coercively interrogate employees about union activities.

WE WILL NOT interfere with our employees' union activities.

WE WILL NOT lay off, discharge, or discriminate against any employee for supporting General Sales Drivers and Allied Employees, Local No. 198, or any other union.

AMERICAN ART INDUSTRIES, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

Note: Notify the above-mentioned employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 826, Federal Office Building, 51 SW First Avenue, Miami, Florida, 33130 Telephone 350-5391.

[TITLE OMITTED]

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's judgment in the above-captioned case has this day been served by first class mail on the following counsel at the addresses listed below:

Marchant, Perkins and Cook
Att: Joseph A. Perkins, Esq.
M-107 Biscayne Building
Miami, Florida 33130

Hillary Silverman, Esq.
311 Biscayne Boulevard
Miami, Florida 33132

/s/ Marcel Mallet-Prevost

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C. this 12th day of September, 1969.

[TITLE OMITTED]

PETITION FOR REHEARING

The Petitioner, AMERICAN ART INDUSTRIES, INC., in accordance with the Rule 40 of this Court, respectfully petitions the Court to reconsider its Opinion, filed in this cause on September 5, 1969, and Judgment entered thereon, and to grant the Petitioner a rehearing upon the following grounds:

1. That in the Opinion[1] and the Judgment filed in the above cause we respectfully suggest that the Court, in its finding that the union represented the majority of the employees in an appropriate bargaining unit, arrived at such conclusion by the application of legally unsound principles and that there was a complete abuse of discretion by the Trial Examiner and the Board in this cause as follows:

The Court cited U.S. v. White, 322 U.S. 694, 700-701 (1944) in the arriving at its conclusion that Ted Foster, president of American Art Industries, could not claim the privilege of self-incrimination on the basis that it is elementary that an officer of a corporation cannot assert such privilege to prevent production of the books and records of the corporation. The Court completely overlooked the fact that the subpoena B-63553 (General Counsel's Exhibit 4(a)(1), App. 1110-1111), was a *subpoena* duces tecum and ad testificandum *directly solely* to Ted Foster individually . . . and not as an officer. Indeed, the subpoena was received by one, I. Osborne (App. 479), and while counsel admits that receipt thereof, objection was made to its introduction (App. 479): In *White*, supra, page 1250, the marshall served a subpoena duces tecum upon the president of the union *as the president; nor was there*, in *White*, supra, *any* effort or an indicated intention to examine him personally as a witness, while the Foster subpoena was one also of ad testificandum,[2] and

[1]Slip Opinion.

[2]No attempt to enforce the subpoena was made under Section 11 of the Act, 29 U.S.C. Section 161(2), which Section was obviously for the purpose of protecting the Respondent as well as the Board, and as a result thereof it became necessary for the Respondent later to enjoin the requirement of any production of documents, *Foster v. Gilbert, et al. January 6, 1967, 264 F.Supp. 209*, to protect the rights of Foster because of the conduct of the prosecution and Trial Examiner in this cause. *There was no appeal.*

it was the obvious intention to require Foster to testify even though he was, then and there at that time, under a *criminal charge filed* by one of the alleged discriminatees, Gonzalez, *at the behest of the Union* (see Respondent's brief, page 8). The subpoena in *White*, supra, was directed to the union.

Most seemingly, therefore, as a matter of law, under the facts of this case, Ted Foster would be entitled to his constitutional privilege. Foster would be entitled to the same immunity as granted in *Curcio v. U.S. 354 U.S. 118, 77 S. Ct. 1145 (1957);* only recently the Supreme Court, in *Brussel v. U.S. 90 S. Ct. 2 (October 10, 1969)*, in releasing Brussell, recited:

> "Curcio v. United States, 354 U.S. 118, 77 S. Ct. 1145, 1 L. Ed. 2d 1225 (1957), raises serious questions concerning the validity of the contempt order. In that case, a union official, admittedly the custodian of the union's records, refused on Fifth Amendment grounds to reveal their whereabouts to the grand jury. This Court upheld the assertion of the privilege holding that the corporate records exception applied only to the records themselves, not to testimony concerning them, and reiterating the established principle that *"all oral testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege."* Id., at 124, 77 S. Ct. at 1150, citing Shapiro v. United States, 335 U.S. 1, 27 68 S. Ct. 1375, 92 L. Ed. 1787 (1948)." (Emphasis supplied)

The privilege against self-incrimination should be accorded a liberal construction. *(Spevack v. Klein, 87 S. Ct. 625 (1967)*, the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used *(Application of Galt, 87 S. Ct. 1428, 387 U.S. 1.* See also: *Ballmann v. Fagin, 26 S. Ct. 212, 200 U.S. 186*, where the Court justified a refusal to produce under the claim of privilege.

2. That the Court, in its Opinion and Decision, failed to give full consideraton to the fact that the Trial Examiner, in his exclusion of credible evidence, particularly with regard to violence in connection with the obtaining of authorization cards, committed serious error and indeed denied unto the Respondent, Petitioner here, due process and equal protection under the law.[3] For example:

> Upon cross-examinaton of Margarita Soto, counsel for American Art Industries had to proffer the testimony that this Government witness testified (App. 278) in the injunction suit in the Circuit Court, and "that her testimony there was that there was violence and threats in connection with the picketing and in the *signing of the cards* . . . "; counsel for Respondent was denied full opportunity to cross-examine.
>
> Nor would the Trial Examiner permit the cross-examination of Mr. Schutzer, the Union business agent, to test his credibility, nor for the purpose of impeachment (App. 764-765).

[3]Of course this, to a great extent, goes to substantial evidence and bias of the Trial Examiner which is discussed in connection herewith. *Reference is made to American Art's brief previously filed in this cause which is replete with incidents in addition to those discussed in this paragraph 2.*

Again, the Government witness, Melton, personally restrained by the Circuit Court in and for Dade County in Case No. 66-C-8119, still pending, from her violence, could not be cross-examined, the Trial Examiner saying such matter was immaterial (App. 302), while, in a like manner, counsel was not permitted to test the credibility of the Government witness, Rodriguez, in connection with criminal charges involving picketing (App. 346).

Indeed, an example of the lack of objectivity on the part of the Examiner is indicated (App. 711-722) when after some conversation and objection by the General Counsel the Trial Examiner said: "Objection sustained and *we* deny your motion."

The conduct of the Trial Examiner above, in denying the right to fully explore the avenues with regard to the obtaining of the cards as a result of violence,[4] is not covered by the case of *Continental Box Company v. N.L.R.B., 5th Circuit (1940) 113 F.2d 93*, for the record in *Con-*

[4]Nor, for that matter, is the fact that the Spanish-speaking employees, who spoke no English, covered by or intended to be covered by the case of *N.L.R.B. v. Gissel Packing Co. 89 S.Ct. 1919*, for the Supreme Court, in its partial adoption of the rule in *Cumberland Shoe, 144 N.L.R.B. 1268 (1963)*, with regard to precluding a probe into subjective *intent*, could not have intended that its decision covered cards where there was absolutely *no meaning* as to employees of the type involved here (nor does *Gissel* recite that violence in the obtaining of authorization cards is permissible); these cards were not bilingual and this very Court recognizes the problem, for in *Marriott In-Flite Services v. N.L.R.B. 72 LRRM 2455* the Court there invalidated a representative election because of the failure to provide Spanish ballots for one-third of the voters, who spoke only Spanish, and recited that *minimum standard of fairness must be met*. It must be remembered that *Gissel* stated that the present Board policy, left undisturbed by the Supreme Court in that decision is that: "when confronted by a recognition demand

tinental Box not only discloses an entire absence of the determined purpose on the part of the Examiner to reach a predetermined end, but, unlike here, *a hearing conducted in an atmosphere of exemplary fairness during which petitioner was afforded every opportunity to present its side*, followed by "reasonable conclusions" announced by the examiner in a spirit of eminent fairness and impartiality. This is unlike the case of *N.L.R.B. v. Transport Clearings, Inc., 5th Circuit, 311 F.2d 519*, because there Judge Bell said, at page 522, "The examiner neither prosecuted nor assisted the general counsel in the prosecution, nor did he, as sometimes happens in administrative proceedings and judicial hearings, take over the trial from counsel." Such statement certainly does not fit this case.

It is obvious that substantial evidence on the record as a whole fails to support the Board's findings of substantial evidence and this Court's approval thereof. Here the Trial Examiner completely disregarded all testimony produced by American Art on the premise nobody would ever tell the truth and accepted the Government's witnesses, incredible as the testimony was, as gospel.

In *N.L.R.B. v. Bush Hog, Inc. 405 F.2d 755 (1968)* this Court, on page 756, made the following recitation:

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based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may * * * decline the union's request and insist on an election * * *." 89 S.Ct., at p. 1928. Nor is he "obligated to accept a card check as proof of majority status * * * and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status." p. 1937 and: "Under current Board policy, however, as described by the Supreme Court in Gissel, an employer's good faith doubt is largely irrelevant; he" can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct * * *." 89 S.Ct., at p. 1930.

> "As the Supreme Court said in the Pittsburgh S.S. Co. case, supra, " * * * total rejection of an opposed view cannot of itself impugn the integrity or competent of a trier of fact." 337 U.S. at 659, 69 S. Ct. at 1285. That case does, however, further establish that credited evidence may be so incredible as to carry "its own death wound" and that discredited evidence may carry "its own irrefutable truth." 337 U.S. 660, 69 S. Ct. 1283. There have been cases in which this Circuit and others have referred to such blanket credibility resolution as some evidence of bias and unfairness. See, e.g., *Local No. 3 v. NLRB* 8 Cir. 1954, 210 F.2d 325, 329, 330; *NLRB v. Miami Coca-Cola Bottling Co., 5 Cir. 1955, 222 F. 2d 341, 345;* NLRB v. Cosco Products Co., 5 Cir. 1960, 280 F.2d 905, 908." (Emphasis supplied)

The fact that a judgment may be justified on its merit does not obviate the requirement of a fair hearing. The principles announced by this Circuit in *N.L.R.B. v. Phelps, 136 F.2d 562* govern here.[5] American Art had no unsavory labor relations history as in *N.L.R.B. v. Reed & Prince Manufacturing Co., 205 F.2d 131*, cited by this Court, nor the other cases cited by this Court in its Opinion a propos of the situation here, but merely recitations that substantial evidence is necessary to support the Board's conclusions. As stated in *N.L.R.B. v. Pittsburgh S.S. Co. 69 S. Ct. 1283, 1285, 337 U.S. 656, 659:* "Credited evidence may be so incredible as to 'carry its own death wound' and discredited evidence may carry its own irrefutable truth." See again: *N.L.R.B. v. Miami Coca-Cola*

[5]See also *NLRB v. Bryan Mfg. Co. C.A. 7, 196 F.2d 477*, and *Ohio Bell Tel., v. Public Utilities Comm. 57 S.Ct. 724.*

Bottling Company, supra.[6] With regard to the unfair labor practise charges, it must be remembered that immediately upon receipt of a demand by the Union, *on that day, Friday*, July 22, 1966, the Company replied denying the Union's majority union status, and suggested the use of the Board's facilities (Opinion 5); that on the very *Monday following*, July 25th, as soon as humanly possible after receipt of demand the *Employer filed a petition seeking an election*, Case *No. 12-RM-133*. (See Footnote 4, supra, with regard to *Gissel*.)

3. That in the Opinion and Judgment filed in the above cause the Court, as did the Board, and hearing officer, misapplied the holding in the case of *Bannon Mills, Inc., 146 N.L.R.B. 611* to the facts herein involved.

In *Bannon Mills* the subpoena duces tecum and ad testificandum was directed to Harry Silber *as president* of Bannon Mills . . . . unlike here. There was *no claim of privilege* in *Bannon Mills*, nor was its president, Silber, under a pending criminal charge; in the case at hand counsel for American Art produced for an in camera inspection the payroll records of its employees, but the Trial

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[6]See *Chesapeake & Ohio R. Co., v. Martin, 283 U.S. 209, 51 S.Ct. 453*, where the Court, reversing a trial judge's refusal to sustain a demurrer to the evidence on the ground that a complete defense was established by uncontradicted, unimpeached testimony, concluded:

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt." 283 U.S. at 216, 51 S.Ct. at 456. See also definition of substantial evidence in *Illinois Central Railroad Co. v. Norfolk and Western Railroad Co., 87 S.Ct. 255, 385 U.S. 57.*

Examiner would not look at them.[7] In the case at bar the Company offered to produce the 76 time cards (App. 32). These 76 time cards were offered into evidence but refused (App. 36). The time cards were at all times available and before the hearing officer and some were even introduced into evidence (App. 875-876), but the hearing officer continually persisted in demanding earnings records so that it became necessary, as aforesaid, to obtain *a writ of habeas corpus* and order restraining the Trial Examiner (App. 1166-1167). The Trial Examiner was a party to the proceeding in the Federal District Court enjoining efforts to obtain records from Foster, and was dismissed only when he stated he would not attempt to elicit the information any further himself (App. 1239). After that he announced that he would not thereafter admit earnings records or any and other evidence even though Foster, by the action of Judge Mehrtens in the United States District Court, was then and there exculpated from any wrongdoing (see Respondent's brief previously filed herein.)

As heretofore stated, American Art could no longer offer any evidence. *The Trial Examiner ignored the fact that the time cards were the original records dated and signed by the employees and were the records from which all other records were of necessity taken.* It is obvious that the best evidence obtainable to prove the disputed fact of the number of employees was not adduced. Time cards were like the "tally sheets" referred to in the case cited by this Court: *Sylvania Electric Products, Inc. v. Flanagan, 352 F.2d 1005, Syllabus 1-5, at pages 1007-1008.* It appears, affirmatively, that the oral evidence

[7]The Subpoena B-63553 called for earnings records. American Art Industries has no earnings records. It is presumed General Counsel meant payroll records; nor does it appear that a petition to revoke was filed in *Bannon Mills*, as in the instant case (App. 32). It does appear, however, that there were 332 cards in the racks at *Bannon Mills* plant.

allegedly adduced or attempted to be adduced by the General Counsel could not even get in the back door of a J.P. Court. All the rules of evidence were ignored, not only in the failure to receive the time cards but the subsequent failure to receive the employment records. See: *United States v. Wood, 39 U.S. 430,* which holds that secondary or *unfair* evidence shall not be substituted for evidence of higher nature which case admits to. (See also: *Cooke v. Woodrow, 9 U.S. 13, Brooks v. Marbury, 24 U.S. 78, Tayloe v. Riggs, 26 U.S. 591,* and *Illinois Central Railroad Co. v. Norfolk & Western Railroad Co.,* supra.

This very Court, in *N.L.R.B. v. Capital Fish Co., 294 F.2d 868, at page 872,* stated:

> "In the district courts improper exclusion of evidence, if prejudicial, will cause a reversal of the judgment. Cervin v. W. T. Grant Co., 5 Cir., 1938, 100 F.2d 153. No special characteristics of an administrative hearing justify the exclusion of evidence which it would be error to exclude in a court trial, and in several cases N.L.R.B. orders have been reversed for the wrongful exclusion of evidence."

The Court then cited the cases of *N.L.R.B. v. Adhesive Products Corp. 258 F.2d 403, N.L.R.B. v. Tennessee-Carolins Transportation, Inc., 226 F.2d 743,* and *N.L.R.B. v. Burns, 203 F.2d 438.* For a later case see the *Miami Coca-Cola Bottling Co. case,* supra. The facts in *Bannon Mills,* supra, are not controlling in this action. The Trial Examiner, by his exclusions and restrictions, prevented the fairness required in an administrative hearing and the holding in *Bannon* was improperly applied to the instant case.[8]

[8]It is never really claimed that the Trial Examiner, in the second action (12-CA-3697(1-3) was prejudiced except by osmosis, that is to say, reliance upon the first Trial Examiner, and Board Decision.

4. Petitioner further points out that the Court, in holding that American Art Industries had committed a violation of Section 8(a)(4) of the Act by discharging the 2 employees because they testified at the previous hearing, overlooked the case of *N.L.R.B. v. Walton Manufacturing Company 369 U.S. 404, 82 S. Ct. 853 (1962)* where the Court held that the test as to substantiability of evidence in all Labor Board cases is the same; the Court went on to hold, in *Walton*, a back-pay case, that employers statements under oath that union membership or activity was not ground for discharge must be believed, *unless there is impeachment of employer of substantial contradiction* and that if there are circumstances that raise doubts they must be consistent with positive sworn evidence on exact point.

HERE FOSTER WAS ASKED:

Did you lay off the 2 employes because of Union activity or because they testified before the Board? (App. 1247)

FOSTER ANSWERED:

"No, we did not lay them off because of any union activity or any kind of testimony."[9] (App. 1247)

[9]Foster went on to say: Nor were they fired (App. 1248). Trujillo could not read nor write in any language (App. 1294); he spoke only Spanish and did not understand English (App. 1189), and there was no longer any employee in the plant who could speak to him in Spanish (App. 1211-1220). There was a communication gap (App. 1231-1232). Upon their return to work there was a time card for both Mosely and Trujillo.

In any event, neither Mosely (App. 1178-1189, 1301, 1302) nor Trujillo (App. 1189-1222, 1285, 1401), *nor anyone else, ever contradicted in the slightest or impeached the testimony of Foster, supra* (App. 1247).

It appears that there was not substantial evidence to support the findings based upon the above and foregoing and a re-examination of *Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S. Ct. 436* supports the position of American Art Industries, Inc. While this case has been remanded to the Board for reconsideration in the light of *Gissel*, supra, it is suggested that remand was not necessary, and that the Court should reconsider even its remand with regard to the 8(a)(5) charge and hold that a bargaining order is improper.[10]

WHEREFORE, Petitioner moves this Honorable Court to grant a rehearing and, upon rehearing, vacate and set aside its Opion and Judgment and to deny enforcement, as in the manner sought by American Art Industries in its brief previously filed (page 52).

Respectfully submitted,

HILERY F. SILVERMAN and
JOSEPH A. PERKINS
M-107 Biscayne Building
Miami, Florida 33130

By: /s/ Joseph A. Perkins
Joseph A. Perkins, of counsel for
American Art Industries, Inc.

[10]It is also pointed out that the Court of Appeals for the District of Columbia in *I.L.G.W.U. v. N.L.R.B. (July 1969) 414 F.2d 1214*, at page 1216, in remanding to the Board for reconsideration in the light of *Gissel*, required the Board to act within 60 days.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the above and foregoing Petition for Rehearing were served on counsel for the National Labor Relations Board as provided in Rule 31(b) of the Rules of Appellate Procedure this day of November, 1969.

JOSEPH A. PERKINS

[TITLE OMITTED]

(November 26, 1969)

ON PETITION FOR REHEARING

Before WISDOM, MORGAN, Circuit Judges, and DAVIS*, Court of Claims Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

[TITLE OMITTED]

ORDER GRANTING INJUNCTIVE RELIEF

THIS CAUSE having come on to be heard before me upon the sworn Complaint of the Plaintiff herein and the Court being otherwise fully advised in the premises, it is

*Judge Oscar H. Davis, U. S. Court of Claims, Washington, D. C., sitting by designation.

ORDERED, ADJUDGED AND DECREED:

1. That the Defendants, and each of them, and any individuals acting by, through or on behalf of the said Defendants, be and the same are hereby enjoined from any picketing, gathering or massing on or about the premises or property of the Plaintiff, American Art Industries, Inc., adjacent property, N. W. 73rd Street or sidewalks contiguous or near to plaintiff's premises and from threatening, intimidating, abusing or using obscene language against plaintiff's employees, agents, servants or officers, or against Plaintiff's business invitees, or social invitees or licensees, including but not limited to delivery truck drivers and service or repair men, and further from harrassing or preventing their peaceful egrees and ingress on or from the premises of Plaintiff, adjacent property, stores or sidewalks, and further from intimidating, harrassing, threatening or coercing any of Plaintiff's employees, agents or servants or officers at any place, including but not limited to their places of abode or means of transportation to and from their residence to plaintiff's offices located at 2751 NW 73rd Street.

2. That this Order be and the same is hereby effective immediately and service upon any Union representative, including the named defendants, shall be notice to all other Defendants, and failure to obey this Order shall be deemed a contempt of Court.

3. This Order shall remain in full force and effect until further Order of this Court.

4. A hearing on this matter is hereby set for the 8th day of August, 1966 at 9:30 o'clock A.M. in the Chambers of this Court at the Dade County Court House.

DONE AND ORDERED in Chambers at Miami, Florida this 1st day of August, 1966.

/s/ HENRY L. BALABAN

Circuit Cudge

[TITLE OMITTED]

ORDER

THIS CAUSE having come on to be heard before me upon the Motion of the Defendants to dissolve the temporary injunction, and the Court having heard the testimony of Carolyn Bostwick, Margaret Williams, Bertha Gail Moore, Emilia Carrato, and Eugene Williams, on behalf of the Plaintiffs, and further having heard the testimony of witnesses adduced by the Defendants, and having heard argument of counsel for the respective parties, and being otherwise fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED:

1. The testimony adduced on behalf of the Plaintiff indicates that there has in fact been unlawful threats committed by some of the named defendants against employees of the Plaintiff as an incident to the picketing which commenced on July 19th in front of the Plaintiff's premises at 2751 NW 73rd Street and that additional threats of violence, coercion and intimidation have occurred as the employees of Plaintiff have attempted to arrive at or leave the premises of the Plaintiff and have

occurred at or near the residence of one of Plaintiff's employees, and further that there has been a gathering or massing of some 25 to 30 individuals at times near or adjacent to the property of the Plaintiff for the purposes of picketing or support for those already engaged in picketing.

2. It is not the intention of this Court to restrain lawful picketing, but in view of the testimony adduced, it is necessary to continue the Order granting injunctive relief of August 1, 1966 to the extent that the Defendants and each of them, and any individuals acting by, through or on behalf of said Defendants be and the same are hereby enjoined and restrained from threatening, intimidating, abusing or using obscene language, motions or gestures against Plaintiff's employees, agents, servants or officers, or against Plaintiff's business invitees, social invitees or licensees, including but not limited to delivery truck drivers and service or repairmen, and further from harrassing or preventing their peaceful egress and ingress on or from the premises of Plaintiff, adjacent property, stores or sidewalks, and further from intimidating, whether by motion, gesture, language, or harrassing, threatening or coercing any of plaintiff's employees, agents or servants or ofifcers at any place, including but not limited to their places of residence, or means of transportation to and from their residence to Plaintiff's offices located at 2751 NW 73rd Street.

3. That portion of the Order granting injunctive relief which enjoins the defendants from any picketing is hereby amended to provide that the Defendants may provide two pickets for each entrance facing NW 73rd Street which shall not be more than six pickets who may

not parade at more than two abreast, and who shall not go onto Plaintiff's premises or property, nor shall there be a massing or gathering of more than an additional ten individuals other than the pickets above described, such ten individuals staying more than 30' from Plaintiff's premises or property, nor shall there be an accumulation or parking of cars belonging to the Defendants or used by the Defendants within 30' of the Plaintiff's premises or property.

4. It is implicit, of course, that such individuals and such pickets are subject to all of the restraints set forth in this Order.

5. The failure of the Defendants, and each of them, to obey this Order, shall be deemed a contempt of Court.

6. This Order shall remain in full force and effect until further Order of this Court.

7. The Plaintiff shall post a cost bond in favor of the Defendant, General Sales Drivers and Allied Employees, Local Union 198 in the amount of $100.00, said bond to be either with an adequate surety or an individual bond by the Plaintiff, and approved by the Clerk of this Court.

8. This Order be and the same is hereby effective immediately, and service upon any Union representative, including the named Defendants, shall be notice to all other defendants, or, in the alternative, service upon the attorney for the Defendants, Lawrence Hollander, shall be notice to all Defendants.

DONE AND ORDERED in Chambers at Miami, Florida this 4 day of August, 1966.

HENRY L. BALABAN

Circuit Judge

STATE OF FLORIDA)
: SS
COUNTY OF DADE)

I, E. B. LEATHERMAN, Clerk of the Circuit Court in and for Dade County, Florida, do hereby certify that the foregoing pages contain true and correct copies of certain Orders entered in the case of American Art Industries, Inc., Plaintiff, against General Sales Drivers and Allied Employees, Local Union 198, et al., Defendants, Civil Action No. 66C 8119, presently pending in this Court, the instruments being as follows to-wit:

Injunctive Order filed on August 1, 1966 recorded in Circuit Court Chancery Order Bk. 1935 on page 340;

Order dated August 4, 1966, entered in and recorded in Circuit Court Chancery Order Bk. 1936 on page 88;

according to the records and files of this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 18 day of February, 1969.

E. B. LEATHERMAN, CLERK
Circuit Court

By /s/ Gladys Wiese

Deputy Clerk

[TITLE OMITTED]

IN THE NAME OF THE UNITED STATES OF AMERICA:

TO: Respondents, each of them above named, individually and collectively.

You are hereby commanded to have the body of THEODORE FOSTER by those of you detained, as it is said together with the time and cause of such detention, including original Warrants of Arrest and supporting affidavits of July 27, 1966, before W. D. MEHRTENS, Judge, District Court, Southern District of Florida, on the 30th day of November, 1966, at 8:45 A.M. to do and receive what shall then and there be considered concerning the said THEODORE FOSTER so that appropriate judgment may be rendered.

You are further commanded, pending a full hearing or until further order of this Court, to cease and desist from:

1. In any way effectuating the prosecution of THEODORE FOSTER for any violation of Chapter 447, Florida Statutes, or of 833.05, Florida Statutes, either by the filing of any information in any State Court or causing any process or warrant of arrest to issue or if issued to void and cause same to be withdrawn.

2. Requiring THEODORE FOSTER to testify or respond to or produce any records described in the Subpoena Ducee Tecum issued by the National Labor Relations Board (dated November 16, 1966, 63-63551) or by virtue of any other process to require him to testify or produce any records.

WITNESS the Honorable W. O. MEHRTENS, Judge, United States District Court, Nov. 26, 1966.

/s/ W. O. MEHRTENS
Judge, United States District Court

29 U.S.C.A. §157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, §7, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, §101, 61 Stat. 140.

29 U.S.C.A. §158.

(a) It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:****

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

[TITLE OMITTED]

Case No. 12-CA-3577(1-2)

DECISION AND ORDER

On March 24, 1967, Trial Examiner Marion C. Ladwig issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's

Decision, the Respondent's exceptions and brief, and the entire record in this case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner with the following modifications.

1. The Trial Examiner found, and we agree, that the Respondent interrogated and threatened its employees and made promises of benefit, discriminatorily discharged four employees, and refused to recognize and bargain with the Union as the representative of its employees in an appropriate unit, in violation of Section 8(a)(1), (3), and (5).

2. On July 20, 1966, the Respondent's employees went on strike to protest the discriminatory discharges. The strike was, therefore, as found by the Trial Examiner, an unfair labor practice strike. On two separate occasions after the strike began, the Respondent offered to take back all its striking employees, including the four who had been discriminatorily discharged. The Respondent, however, at the time of its first offer, made no effort to dissipate the effects of its various violations of Section 8(a)(1). Furthermore, this offer was followed closely by the Respondent's unlawful refusal to bargain. At the time of the second offer of reinstatement, the Respondent made no attempt to remedy the effects of its continuing violations of Section 8(a)(1) and of 8(a)(5). We agree, therefore,

[1]The Respondent excepts to the credibility resolutions made by the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions as to credibility unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Such a conclusion is not warranted here. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3).

The Respondent also contends that the Trial Examiner was biased against it, but our examination of the record reveals no basis for this contention.

with the Trial Examiner that the strike, which was still in effect at the time of the hearing, continued to be an unfair labor practice strike.[2]

3. The Trial Examiner found that the Respondent refused to bargain with the Union in violation of Section 8(a)(5) of the Act on July 22, 1966, when the Respondent sent the Union a letter rejecting a written request for recognition and bargaining. We agree. We do not agree, however, with the Trial Examiner's further finding that the Respondent violated Section 8(a)(5) beginning on July 20, 1966. On that date, the employees, who were assembled in front of the plant prior to their strike vote, shouted, in the presence of the Respondent's officials, "We want union, we want union." The Trial Examiner found that the employees had thereby advised the Respondent of their desire for representation, and "the Union at least informally demanded recognition by adopting the majority strike and picketing with signs protesting the Company's unfair labor practices, over the name of the Union." The Trial Examiner concluded that the Respondent "had an obligation at that time to respond to the informal recognition demand and to offer to bargain with the Union." We find, however, that such a vague and informal indication of a desire for collective bargaining did not create an obligation on the part of the Respondent to bargain with the Union.[3]

4. The Trial Examiner also found, and we agree, that the Respondent made an unconditional offer of reinstatement to the four discharged employees on July 21, 1966;

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[2]See *Art Metalcraft Plating Co., Inc.*, 133 NLRB 706, enfd. 303 F.2d 478 (C.A. 3).

[3]See *American Buslines, Inc.*, 164 NLRB No. 136; *John Wafford d/b/a Wafford Cabinet Company*, 95 NLRB 1407.

that their failure to accept this offer had the effect of changing their status from discriminatorily discharged employees to unfair labor practice strikers;[4] and that this resulted in the termination of their right to backpay on that date. In his Recommended Order, however, the Trial Examiner requires the Respondent to offer reinstatement to the four employees. As they are unfair labor practice strikers, however, not dischargees, we shall require the Respondent, as in the case of the other strikers, to offer them reinstatement upon application.

5. The record shows that many of the Respondent's employees are Spanish speaking. We shall therefore require that the Notice to All Employees, contained in the Appendix attached to the Trial Examiner's Decision, be posted in Spanish as well as in English.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner and orders that the Respondent, American Art Industries, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as modified herein:

1. Change paragraph 1(a) of the Trial Examiner's Recommended Order by inserting "International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America," after "Local No. 198."

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[4] *Spitzer Motor Sales, Inc.*, 102 NLRB 437, enfd. 211 F.2d 235 (C.A. 2); *Coca Cola Bottling Co.*, 95 NLRB 284, modified in another respect and enfd. 195 F.2. (C.A. 8).

2. Change paragraph 2(c) of the Trial Examiner's Recommended Order to read:

"Make J. D. Mosley, Herman Gonzalez, Jesus Diaz, and Carlos Paez whole in the manner set forth in the section of the Trial Examiner's Decision entitled 'The Remedy.'"

3. Change the first sentence of paragraph 2(f) of the Trial Examiner's Recommended Order to read as follows:

"Post at its plant in Miami, Florida, in both Spanish and in English, copies of the attached notice marked 'Appendix.'"

Dated, Washington, D.C. July 31, 1967.

[TITLE OMITTED]

DECISION AND ORDER

On December 18, 1967, Trial Examiner Thomas N. Kessel issued his Decision in the above-entitled case, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions and brief, and the entire record in this case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act as amended, the National Labor Relations Board adopts as its order the Recommendations of the Trial Examiner, as modified below, and hereby orders that the Respondent, American Art Industries, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommendations Order as herein modified.

1. Amend subparagraph (a) of paragraph 2 of the Trial Examiner's Recommendations by inserting between the words "positions" and "and" the pharse "without prejudice to their seniority or other rights and privileges . . ."

2. Insert a new subparagraph (c) of paragraph 2 of the Trial Examiner's Recommendations, to read as follows, and reletter present subparagraphs (c) and (d), as "(d)" and "(e)".

[1]The Respondent excepts to the credibility resolutions made by the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions as to credibility unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Such a conclusion is not warranted here. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3).

The Respondent also contends that the Trial Examiner was biased against it, but our examination of the record reveals no basis for this contention.

"(c) Notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces."

Dated, Washington, D. C. March 20, 1968.

Frank W. McCulloch, Chairman

John H. Fanning, Member

Sam Zagoria, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1146

AMERICAN ART INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The Board found that petitioner violated Section 8(a)(1) of the National Labor Relations Act by coercively interrogating its employees about the General Sales Drivers and Allied Employees, Local 198, IBT, during the course of an organizational campaign, by threatening to close its plant if a union came in, by promising benefits to undermine the Union's organizational drive, and by threatening to discharge any employee who joined a strike against the Company

(R. 42).[1] The Board also found that the Company violated Section 8(a)(3), by discharging four employees because of their activities on behalf of the Union, and Section 8(a)(4), by discharging two employees for testifying at a Board hearing (*ibid.*). Finally, the Board found that the Union had obtained valid authorization cards from a majority of the employees in an appropriate unit at a time when it sought recognition and bargaining (R. 37-39); that petitioner's refusal to bargain with the Union was not in good faith (R. 39); and that petitioner's refusal thus violated Section 8(a)(5) of the Act (R. 41-42; Pet. App. 43).

The Board ordered petitioner to cease and desist from the unfair labor practices found (R. 44-45, 63); to reinstate striking employees upon application and grant them backpay where appropriate, including the four employees discharged in violation of Section 8(a)(3) (R. 42-43; Pet. App. 43-44); to reinstate with backpay the employees discharged in violation of Section 8(a)(4) (R. 42; Pet. App. 46); and to bargain, upon request, with the Union (R. 44).

The court of appeals sustained the Board's findings and conclusions, and enforced its order in regard to the violations of Section 8(a)(1), (3), and (4) of the Act (Pet. App. 8-9). Although the court also sustained the Board's finding that the Union possessed valid authorization cards from a majority of the employees in an appropriate unit when it

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[1] "R." references are to the appendix to the parties' briefs in the court below.

sought recognition and bargaining, it remanded the Section 8(a)(5) issues to the Board for reconsideration in light of this Court's decision in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575 (Pet. App. 14-15).

Petitioner principally challenges the factual predicate for the Section 8(a)(5) finding.[2] It contends that English language authorization cards signed by Spanish-speaking employees could not be used to prove the Union's majority status; that the Company was improperly denied the right to produce evidence relating to the size of the appropriate unit; and that it was prejudiced by other evidentiary rulings of the Trial Examiner. These are all factual issues (see Pet. App. 9-14) which even if ripe would not warrant further review. But here the petition is premature. The court of appeals remanded the refusal-to-bargain portion of the case to the Board for reconsideration. Although the Board has since reaffirmed its Section 8(a)(5) finding and its bargaining order remedy,[3] that decision will not be ripe for review by this Court until

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[2] Petitioner's statement of questions involved (Pet. 5-6) and the bulk of its argument relate only to the Section 8(a)(5) violation. At one point, however, petitioner states (Pet. 11): "It is the propriety of the enforcement of the alleged 8(a)(1), (3) and (4) violations *and the remand* which are the issues upon which the Petitioner seeks a writ of certiorari" (emphasis in the original). The sole discussion of these violations relates to the alleged lack of evidentiary support for the Section 8(a)(4) violation (Pet. 23-24)—an issue which does not warrant further review.

[3] The Board's supplemental decision and order were issued on December 5, 1969, 179 NLRB No. 162.

the court of appeals has considered it and, if it sustains the Board, has entered a supplemental decree enforcing the bargaining order.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

MARCH 1970.

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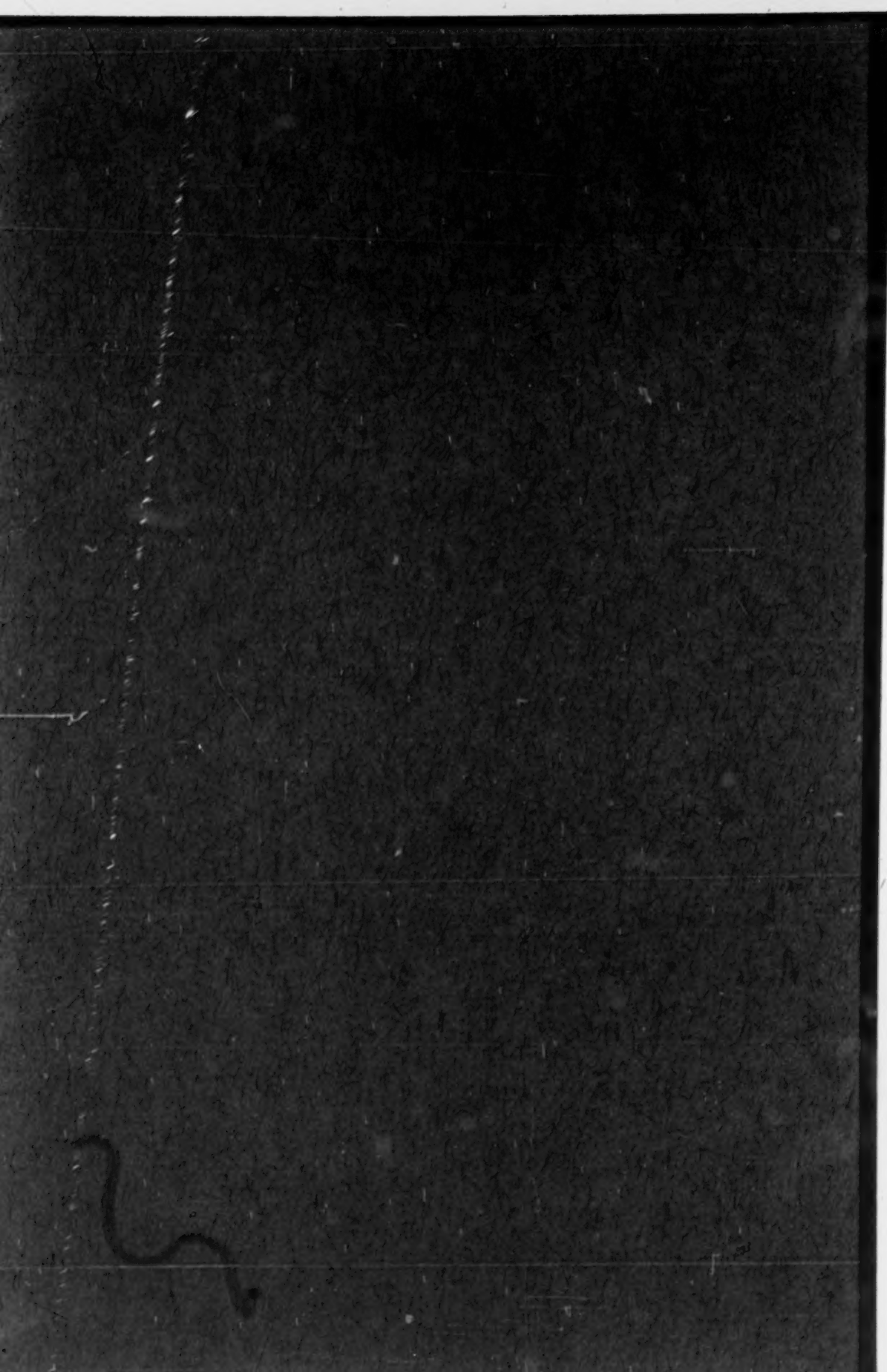

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in the
Supreme Court
of the
United States

October Term 1969

No. 1146

AMERICAN ART INDUSTRIES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner herein respectfully moves this Court for an order vacating its denial of the petition for writ of certiorari, entered on March 23, 1970. As grounds for this motion the petitioner states as follows:

1. THE EFFECT OF GOLDBERG v. KELLY, 90 S. Ct. 1011 UPON THE RULE PRONOUNCED IN N. L. R. B. v. GISSEL PACKING COMPANY, 89 S. Ct. 1918, 395 U. S. 575.

While this cause was pending on appeal the Supreme Court, in **Gissel,** supra, announced its partial adoption of the rule in **Cumberland Shoe,** 144 NLRB 1268, but in so doing, cautioned against the "too easy mechanical application of the Cumberland rule." This Court, in **Gissel,** did not hold that majority status in all instances should be based upon signed authorization cards per se; indeed, the Court held that where a majority status was obtained as a result of coercion, such was illegal and indeed not a majority status. The instant case involves the obtaining of signatures on the cards through threats, coercion and even violence, as is pointed out in brief to the Court of Appeals for the Fifth Circuit and to this Court in its Petition and Reply filed in this Court; moreover, the record is clear that the persons executing the cards were Spanish-speaking, and not bilingual, and could not read nor write English nor understand the language on the cards.

The state court injunction was obtained as a result of this violence and is still in effect. Efforts to examine the witnesses and confront them with regard to the obtaining of cards as a result of violence were denied unto the petitioner by the trial examiner, an obvious erroneous ruling on the facts in this case.

In **Goldberg** v. **Kelly,** supra, this Court, in Syllabus 20-22, recited: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." **Goldberg** involving the right of welfare recipients to confront and **cross-examine** witnesses stands for the proposition that "where governmental action seriously injures an individual, and the reasonableness of the action depends upon fact finding, the evidence used to

prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." The Court, in **Goldberg,** supra, went on to say:

> "While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be perjurous or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment* * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where **administrative.** * * * actions were under scrutiny." (Emphasis supplied)

To be remembered is the fact that the agency involved here is one which does not permit a respondent the use of depositions or the production of documents prior to trial, or the divulgence of any exculpatory evidence as required by **Brady** v. **Maryland,** 373 U. S. 83, 83 S. Ct. 1194.

The decision sought to be reviewed is so shockingly wrong as to deny due process not only to the employer involved, but to its employees who do not and did not desire to be represented by the union involved here. In fact, it would be quite appropriate for the Court to hear and consider propriety of the wide latitude the Board has assumed in its denial unto respondent, petitioner here, of fundamental rights guaranteed by the Fifth and Sixth Amendments.

For the reasons above, therefore, the denial of certiorari should be reconsidered to the end that this case be heard and the law properly applied to the facts as contained in the record.

2. THE BANNON MILLS DOCTRINE AS ANNOUNCED BY THE BOARD HOLDING IN BANNON MILLS, INC., 146 N. L. R. B. 611.

In applying the rule announced in **Bannon Mills,** supra, to the facts of this case, the Board has applied a **rule of evidence** which the **Board** itself **has legislated,** and even so, has misapplied to the facts. The **Bannon Mills** doctrine constitutes now a rule of evidence peculiarly that of the Board and no other agency. Refusing to permit the president of respondent company to testify after he was exculpated from any wrongdoing by the Court of the United States District Court for the Southern District of Florida (**Foster** v. **Gilbert, et al.,** 264 F. Supp. 209) was to deny due process. Even in **Brown** v. **United States,** 359 U. S. 41, 79 S. Ct. 539, a matter involving enforcement attempt against the defendant for refusing to testify before a grand jury, the court, at page 546 held: "When the petitioner first refused to answer the grand jury's question, he was guilty of no contempt. He was **entitled to persist in his refusal** until the court ordered him to answer." In the action at hand **no effort was made to follow the statutory proceedings to require production of documents and testimony** and the action at bar differs from **Bannon Mills** in which no petition to revoke was filed. Even the original time cards and records produced by an employee other than the respondent president were denied admittance, for the apparent simple reason that they were not produced by the president of the company.

It is obvious that the Board's doctrine as announced in **Bannon Mills,** supra, will be the subject of much and future discussion and litigation. Certiorari should have been granted if only in order to resolve a recurring question involving the legitimacy of an agency legislating a rule of evidence, and then applying the same in any manner it so desires.

It is obvious that the application of **Bannon** under the facts here is violative of the holding in **Cursio** v. **U. S.,** 354 U. S. 118, 77 S. Ct. 1145, **Brussel** v. **U. S.** 90 S. Ct. 2 and **Spevack** v. **Klein,** 87 S. Ct. 625, 385 U. S. 511, for nothing was directed to Foster as an officer, director, representative or agent of the respondent company.

Rehearing should be granted here, if for no purpose other than to clarify the arguments advanced in the original Petition for Writ of Certiorari (see **Hickman** v. **Taylor,** 327 U. S. 808, 328 U. S. 876, 329 U. S. 495, and **Brinkerhoff-Faris Trust Co.** v. **Hill,** 280 U. S. 604, 550, 281 U. S. 673), but more importantly, should be granted to rectify an obvious erroneous ruling on the particular facts and for a determination of the authority of the National Labor Relations Board to legislate a rule of evidence.

3. THE BIAS OF THE TRIAL EXAMINER.

As stated in pages 10 and 11 the trial examiner, by some hokus pokus made a majority determination when there was a substantial conflict in evidence, the Fifth Circuit reciting (A: 7): "A review of the record demonstrates that there was a substantial conflict in the evidence with the version of facts presented by the company's witnesses conflicting with the version presented by the Board's witnesses." A large segment of the petitioner's

brief filed in the Court of Appeals for the Fifth Circuit dealt with the prejudice and bias of the trial examiner; the employer respondent, petitioner here, pointed out that the trial examiner clearly exceeded the fairness and propriety required of him, as stated in the cases of **N. L. R. B. v. Pittsburgh S. S. Co.**, 71 S. Ct. 453, **Universal Camera Corp. v. N. L. R. B.** 71 S. Ct. 456.[1] The Court's attention is called to pages 48 through 50 of that brief which are adopted as a part of this petition for rehearing. Moreover, it has specifically come to the attention of the employer, petitioner here, of bias that may well have resulted, and probably did result, by the mere fact that during this period of time the attorneys for the Board and trial examiners were organizing their own union and were union members. The effect of this upon actions and decisions of a trial examiner would be manifest, psychologically and otherwise, whether the examiner was himself a member of the union. Employer, petitioner, calls to the Court's attention two articles, one of which appeared in the Baltimore Sun on December 18, 1964, and the other in the Des Moines Register in January of 1965. The recitations contained in these articles became known to the petitioner subsequent to the denial of the petition for writ of certiorari, and, of course, long after the question raised in the Court of Appeals. They are as follows:

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[1]The decision sought to be reviewed, insofar as it relates to the improper conduct of the Trial Examiner, is in direct conflict with a Sixth Circuit case, to-wit: *Hagopian and Sons, Inc.* v. *N. L. R. B.* (1968), 395 F. 2d 947 in which the Sixth Circuit reversed the Board because of the Trial Examiner's refusal to allow respondent's counsel to develop his theory of the case. In *Hagopian* the Trial Examiner, as here, took over the hearing and generally did the things complained of in the case at bar. All the more reason for granting the petition, as is the fact that the decision by the Fifth Circuit here is in conflict with its own decision in *N. L. R. B.* v. *Phelps*, 136 F. 2d 562 . . . a complete lack of uniformity within the same circuit.

THE SUN,

NLRB, Union Of Attorneys Sign Bargaining Contract

Washington, Dec. 17 (AP)—The National Labor Relations Board officially became an employer, under principles of Federal labor law, in signing a collective bargaining contract with its own attorneys today.

Under the board's contract with the NLRB Professional Association, the lawyers will not have the right to call a strike.

Nor will they be able to bargain for wages, which are set by Congress.

"Not A Typical Contract"

"It's not a typical labor contract like those in private industry," said Charles Caffrey, president of the lawyers' union "It primarily covers career development such as transfers, assignments, regularized advancement, grievances and career opportunities."

Arnold Ordman, general counsel, signed for the board.

The association includes several hundred attorneys in the board's Washington offices. They deal with complaints, injunctions and appeals stemming from labor disputes.

Another organization, the National Labor Relations Board Union, soon also will begin negotiating a contract covering employees in regional offices around the country.

The board's recognition of the two unions initially prompted complaints from several congressmen who questioned the propriety of lawyers who deal with national labor policy belonging to a union themselves.

The board replied that its employees were given the right to organize and win exclusive recognition under a 1962 executive order issued by President Kennedy.

"The board did not have the right to refuse recognition," an NLRB spokesman said.

Nor did it help organize the two unions except to supervise representation elections, he said, adding: "It is illegal to assist a union. The whole thing reverts to the fact that there was an Executive order."

The executive order specifically forbids any union activity of Federal employees where a conflict of interest would be involved.

To avoid any possible conflict, the NLRB Professional Association agreed in the contract not to affiliate with the AFL-CIO or any other labor organizations with which it deals in Federal labor relations cases.

Both NLRB unions are completely independent, officials said.

Walter P. Armstrong, Jr., chairman of the standing committee on professional ethics of the American Bar Association, said the committee has not considered the question of possible conflict of interest in this case. "We've taken no position on it at all," he said in a telephone interview from Memphis, Tenn.

Nora Friel, outgoing president of the National Labor Relations Board Union, said in Cleveland that board employees want a contract for "the same reasons as anybody else—to deal with grievances, working conditions, overtime and other matters."

Lawyers Organize 'Union'

January, 1965

Bias in NLRB Cases

From the Des Moines *Register*

Several hundred lawyers and trial examiners employed on the staff of the National Labor Relations Board (NLRB) have taken a step that jeopardizes the standing of that agency as a fair and objective arbiter of labor disputes.

They have formed the NLRB Professional Assn. through which they will bargain with the board on matters of grievances, promotions, assignments, transfers and career opportunities. The NLRB has signed a contract with the association, saying that it was required to do so under an executive order issued by President Kennedy in 1962.

Calling the organization an association rather than a union is a subterfuge. The association will be the exclusive bargaining agency for attorneys employed by the board. The lawyers association will not have the right to bargain for wages or to strike, but in all other respects it will function as do trade unions. The fact that the association will not be affiliated with the AFL-CIO makes it no less a union than the independent United Mine Workers union or Jimmy Hoffa's Teamsters Union.

The danger involved in the NLRB lawyers' organization is that it casts doubts on the future objectivity with which disputes between employers and unions are handled.

Decisions in these cases rest finally with the five members of the board itself. However, most of the groundwork is performed by lawyers employed by the commission. The lawyers conduct the hearings in disputes between labor and management. They have wide latitude in determining what testimony and evidence will be heard. They evaluate the evidence. They make recommendations to the board. They can and do influence the facts and evidence brought to the board's attention.

The quasi-judicial nature of the NLRB and its proceedings offers many opportunities for prejudicial action without the protection for parties to a dispute that exists when cases are taken to court.

It will be difficult henceforth for any employer having a case before the board to feel that the NLRB lawyers and examiners will be able to handle it with complete objectivity. They would be as much justified in having those fears as members of the trucking industry would be if lawyers for the Interstate Commerce Commission belonged to the Association of American Railroads.

The public generally would soon lose confidence in the courts if judges did not disqualify themselves from presiding over cases in which they have any personal prejudice, interest or commitments. The same situation is true with respect to the NLRB, if the lawyers who handle cases are affiliated with an organization that is for all practical purposes a labor union.

The National Labor Relations Board, whose members are political appointees, has never achieved the solid reputation for unbiased judgment that has been accorded the courts. The action of its staff lawyers in forming an association and insisting on rights and privileges comparable to those of labor unions raises a still higher hurdle to the board achieving such a reputation.

The action of the staff layers of the NLRB should prompt Congress to undertake a long-needed review of the procedures before this agency, and the extent to which the parties to disputes before the NLRB are assured of equitable and objective consideration.

Respondent is now led to believe that the members of the staff of the Regional Director of the Twelfth Region, in the investigation of the charge and the issuance of the complaint in the instant case, may well have been and/or are members of a labor organization, as well as the Trial Examiner hearing the complaint and making the decision herein; and, if this fact be true, a conflict of interest exists within the Agency charged with the impartial enforcement of the Act which could only result in prejudice to a fair, objective and unbiased investigation and trial and decision of the matters in issue to the extent that the respondent, petitioner here, was denied due process of law.

Petitioner was thereby deprived of its right to the fairness required by law.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, the Reply to the Memorandum for the National Labor Relations Board in Opposition, and the certified Brief filed in the Court of Appeals for the Fifth Circuit, the petitioner prays that this Court grant rehearing of the order of denial, vacate said order, and grant petition and review the Judgment and Opinion below.

Respectfully submitted,

JOSEPH A. PERKINS
Attorney for Petitioner
M-107 Biscayne Building
Miami, Florida 33130

CERTIFICATE OF GOOD FAITH

Counsel certifies that the above Petition for Rehearing was presented in good faith and not for delay and the Petition is restricted to the grounds set out in the Petition above.

JOSEPH A. PERKINS

in the
Supreme Court
of the
United States

October Term, 1969

No. 1146

AMERICAN ART INDUSTRIES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REPLY to "Memorandum for the N.L.R.B. in Opposition"

It is difficult to believe that the National Labor Relations Board has seriously (and certainly not properly or

responsively) considered the "Questions Involved" in the "Petition for Writ of Certiorari"; examination of the "Memorandum for the National Labor Relations Board in Opposition" reveals that the Board, whether by design or by inability to discover a plausible argument, has failed and refused to face up to the issues contained in the Petition.

The reference to factual issues as being the basis of the Petition is not only misleading but a concoction to brush aside and avoid reality. The Petition, for example, establishes, re the Board's decision(s), as approved by the lower appellate court, the following:

A that there was and is a misuse and misapplication of cases, including but not limited to United States vs White (354 U.S.118) Bannon Mills Inc. (146 N.L.R.B. 611) and N.L.R.B. vs. Gissel (395 U.S. 575), to establish violation(s).

B that there was and is an almost arrogant refusal to put to use cases, including but not limited to Curcio vs U.S. (354 U.S. 118) N.L.R.B. vs Walton (369 U.S. 404) Wheeler vs N.L.R.B. (314 F2d 260) Hagopian vs N.L.R.B. (395 F2d 947), applicable to the facts even as found, as contrasted with improper factual conclusions, which in truth did occur to the extent such erroneous findings hit one in the face like a Mack Sennett pie, and with the same devastating effect.

C that the decision sought to be reviewed is, with regard to all of the supposedly 8(a) violations, in conflict with decisions of other Courts of Ap-

peal (see Petition) and in more than one instance in conflict with decisions of this very Court White, Walton, *Curcio* and even Gissell, supra.

D that the remanding referred to by the Board, on page three (3) of the "memorandum," has nothing to do with prematureness for it is not the subsequent erroneous action of the Board that is presently complained of, but, instead, the refusal to dismiss the 8(a)(5) because of the admitted inability of the employees to read or write, as a result of a language barrier, and even more importantly for the reason that the *cards*, where obtained, were *procured as a direct result of violence*, duress and other unlawful attendant circumstances; it is not the *ripeness* of the last action presently being lamented, but the rottenness of the first.

All of the above is easily gleaned from the mere reading of the Petition . . . less than twenty-five (25) pages; *there is no genuine answer by the Board.* Even the reference to alleged evidentary support for the referred to 8(a)(4) violation is fallacious for the Board, there ignores the fact that the second trial examiner recited he was bound by the *just* prior issued Board decision . . . Also Walton, supra, was ignored, not even considered; forgetting the improper evidential matters, the Board has come up with a nonsensical response.

As for the factual matters/issues, they, too, are subject to review for these determinations were so abominable, and so grossly erroneous, as to be prejudicial and an abuse of discretion, even process. While petitioner contends the

law requires a reversal without any review of the facts, a hard cold look, with a jaundiced eye, should be had and taken; for there here exists an obvious departure from the essential requirement(s) of law. The lower appellate court recognized the dubiousness of the entire proceeding(s) for it found "*a substantial conflict in the evidence*" (App 7), something the Board in its infinite wisdom (so called expertise) wouldn't acknowledge in the escape from reality with its incredible credibility findings. The Board has simply used its magic words, credibility and expertise as the *excuse* for findings which are to say the least, injudicious. As previously urged, it is about time the excuse (expertise and credibility findings), not the reason, for improper and truly unjust determinations be corralled, if not eliminated entirely.

But, as stated, one does not need rely on impropriety of the evidentiary findings to see the error committed; nor even is it necessary to resort to the constitutional violations of Foster's rights, most material to the matter at hand. A simple look to the cases material should, and does, require the issuance of the writ.

Respectfully submitted

JOSEPH A. PERKINS
Attorney for Petitioner
M-107 Biscayne Building
Miami, Florida